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AGGRAVATING AND MITIGATING FACTORS: THE PARADOX OF TODAY'S ARBITRARY AND MANDATORY CAPITAL PUNISHMENT SCHEME

Jeffrey L. Kirchmeier*

Over twenty years ago, the United States Supreme Court held that both mandatory capital sentencing schemes and total discretionary capital sentencing schemes violate the Eighth Amendment. According to Jeffrey Kirchmeier, the "guided discretion" capital sentencing scheme of sentencing factors that has developed, however, has the constitutional problems of both mandatory death penalties and unlimited discretion death penalties.

Justices Scalia, Blackmun, and Thomas have noted that the mandate of unlimited mitigating circumstances has resulted in an arbitrary system. Kirchmeier argues that today's sentencing scheme is arbitrary also because of undefined aggravating factors, unlimited nonstatutory aggravating factors, and victim impact evidence. According to Kirchmeier, the death penalty scheme also has moved toward a mandatory scheme as legislatures expand death penalty statutes and the Court sanctions other expansions of the application of the penalty. Thus, argues Kirchmeier, the paradox of the present system is that it is both arbitrary and mandatory.

Focusing on the Court's decisions regarding aggravating and mitigating factors, this Article discusses the arbitrary and mandatory aspects of the current system and then examines five options for addressing those constitutional problems: keeping the present system, narrowing the application of the death penalty, returning to unguided discretion statutes, returning to mandatory death penalty schemes, or, as Justices Blackmun and Powell have suggested, abandoning the death penalty.

This Article concludes that a mandatory death penalty scheme is the only way to potentially apply the death penalty in an evenhanded manner. The mandatory aspects of the current scheme and the historical experience with mandatory death penalty schemes, however, illustrate that no human system for selecting defendants for the ultimate punishment can be both fair and nonarbitrary.

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para-dox (par'a dāks') *N.* . . . a statement that seems contradictory, unbelievable, or absurd but that may be true in fact.¹

"There's no use trying," she said: "one *can't* believe impossible things."

"I daresay you haven't had much practice," said the Queen.

"When I was your age, I always did it for half-an-hour a day. Why, sometimes I've believed as many as six impossible things before breakfast."²

A little over twenty years ago, the modern era of capital punishment in the United States began when the Supreme Court, having struck down death penalty statutes four years earlier, upheld several states' new capital statutory schemes.³ Thus began the Court's attempt to develop a reasoned, consistent, and nonarbitrary system of inflicting the punishment of death.

In the Supreme Court's drive to eliminate arbitrary discretion from the use of capital punishment in America, the Court has struggled to create a fair system. In this struggle, the Court has defined two important Eighth Amendment principles: (1) the requirement that the discretion of a capital sentencer be channeled and the group of defendants eligible for death be narrowed;⁴ and (2) the requirement that a sentencer be able to consider any aspect of a defendant's crime or character that is mitigating, thus providing for individualized sentencing.⁵ In embracing these two principles, the Court has rejected both mandatory death penalty schemes and schemes that give total unbridled discretion to the sentencer.⁶ The Court instead has attempted

¹ WEBSTER'S NEW WORLD DICTIONARY 979 (3d ed. 1988).

² LEWIS CARROLL, *THROUGH THE LOOKING-GLASS* 65 (MacMillan Co. 1963) (1872).

³ See *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁴ See, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (striking down the vague application of an aggravating circumstance).

⁵ See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that the Eighth Amendment requires that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death").

⁶ In addition to capital sentencing by juries, a judge may perform capital sentencing. See *Walton v. Arizona*, 497 U.S. 639 (1990); see also *Proffitt*, 428 U.S. at 242. In most states today, capital sentencing is done by a jury, but some states have judge sentencing. Three states—Arizona, Idaho, and Montana—have statutes that allow a single judge to do capital sentencing. See ARIZ. REV. STAT. ANN. § 13-703(B) (West 1989 & Supp. 1996); IDAHO CODE § 19-2515(c) (1997); MONT. CODE ANN. § 46-18-301

to walk the line between such systems.

Individual Supreme Court Justices have reasoned that the two principles are inconsistent and that allowing individual sentencing—and the consideration of any mitigating factor the defendant argues—undermines any attempts by the Court to eliminate arbitrariness.⁷ While Justices Scalia and Blackmun both have argued that these two principles are incompatible, they each propound a different solution. Justice Blackmun agreed with the Court's decisions in prior cases that both principles are necessary to a constitutional death penalty.⁸ Therefore, because the goals cannot both be satisfied, he reasoned, the death penalty is unconstitutional.⁹ Former Justice Powell came to a similar conclusion after his retirement.¹⁰

Justice Scalia, however, concluded that the mitigation principle was not as important as the channeled discretion requirement and, therefore, could be eliminated.¹¹ In short, Justice Scalia stated that the principle of *Furman v. Georgia*¹²—that arbitrariness must be eliminated in capital sentencing—is

(1997). Nebraska's statute allows for a single judge or a three-judge panel to do the sentencing, while Colorado's new statute provides for a panel of three judges to conduct a sentencing hearing. See NEB. REV. STAT. § 29-2520 (1995); COLO. REV. STAT. § 16-11-103(1)(a) (Supp. 1996). Florida, Alabama, Indiana, and Delaware have a pure jury override statute, which allows a trial judge to override a jury's sentencing decision, while Ohio and Kentucky have a variation on the jury override scheme, which allows a trial judge only to reduce a jury recommendation of death to a life sentence. See Roxane J. Perruso, *And Then There Were Three: Colorado's New Death Penalty Sentencing Statute*, 68 U. COLO. L. REV. 189, 215-16 (1997). Generally, the points made in this Article apply equally to jury sentencing states and judge sentencing states.

⁷ See *infra* notes 9, 14.

⁸ See *infra* note 9.

⁹ Justice Blackmun dissented in *Furman v. Georgia*, 408 U.S. 238 (1972), and was among the majority of Justices that voted to uphold the Georgia death penalty statute in *Gregg v. Georgia*, 428 U.S. 153 (1976). See *Furman*, 408 U.S. at 405 (1972) (Blackmun, J., dissenting); *Gregg*, 428 U.S. at 227 (1976) (Blackmun, J., concurring). Over twenty years after *Furman* was decided, however, Justice Blackmun wrote that "the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution." *Callins v. Collins*, 510 U.S. 1141, 1145-46 (1994) (Blackmun, J., dissenting from the denial of the petition for writ of certiorari). Justice Blackmun subsequently dissented in all cases upholding capital sentences for the short time that he remained on the bench.

¹⁰ After his retirement, Justice Powell, who, like Justice Blackmun, was among the dissent in *Furman*, see *Furman*, 408 U.S. at 414 (Powell, J., dissenting), and among the majority in *Gregg*, see *Gregg*, 428 U.S. at 158, stated that he regretted upholding the death penalty. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994); John C. Jeffries, Jr., *A Change of Mind that Came Too Late*, N.Y. TIMES, June 23, 1994, at A23.

¹¹ See *infra* note 14.

¹² 408 U.S. 238 (1972).

the only requirement of the Eighth Amendment.¹³ Thus, he has held that mitigating factors, like aggravating factors, must be specifically designated by the legislatures, or perhaps even eliminated.¹⁴ Justice Thomas has come to a similar conclusion.¹⁵

This Article is an evaluation of the Court's jurisprudence regarding the criteria—generally in the form of aggravating and mitigating factors—for selecting which defendants are sentenced to death and which ones are not. The Article begins by briefly addressing the historical developments leading up to the Court's decisions in *Furman*¹⁶ and *Gregg v. Georgia*,¹⁷ as well as the development of the goals of eliminating arbitrariness and of providing individualized sentencing. Examining the Court's progression, this Article reasons that the Court, while rejecting mandatory and unbridled discretionary sentencing schemes, paradoxically has created a system of aggravating and mitigating factors that embraces the evils of both systems. The Court has moved toward a mandatory death penalty by limiting the use of mitigating circumstances and by permitting expansive aggravating factor statutes. Simultaneously, the Court has retreated from concerns about arbitrariness by permitting capital sentencers to consider several arbitrary factors.

Finally, this Article discusses various proposals by the Justices and other commentators for addressing the problems created by the Court's current

¹³ See *Walton v. Arizona*, 497 U.S. 639, 669-73 (1990) (Scalia, J., concurring).

¹⁴ Justice Scalia initially embraced the principles underlying mitigation evidence and the necessity of individualized sentencing in capital cases in *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (Scalia, J., majority opinion) (holding that a Florida statute unconstitutionally limited consideration of mitigating evidence). However, in 1990, for some of the same reasons that Justice Blackmun began finding the death penalty unconstitutional, Justice Scalia began rejecting the doctrine upheld in *Hitchcock*. See *Walton v. Arizona*, 497 U.S. 639, 672-73 (1990) (Scalia, J., concurring) (holding that Arizona's method of allocating the burden to the defendant to prove mitigating circumstances did not violate the Eighth and Fourteenth Amendments because the State's burden of proving aggravating circumstances was not lessened). The doctrine upheld in *Hitchcock* goes back to cases decided the same day as *Gregg*. See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding that a mandatory death penalty is unconstitutional); *Proffitt v. Florida*, 428 U.S. 242 (1976) (holding that Florida's sentencing procedure did not violate the Eighth and Fourteenth Amendments because it provided trial judges specific and detailed guidance in weighing the eight statutory aggravating factors against the seven statutory mitigating factors to determine whether to impose the death penalty); see also *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that the sentencer should not be precluded from considering mitigating factors).

¹⁵ See *Graham v. Collins*, 506 U.S. 461, 487-500 (1993) (Thomas, J., concurring).

¹⁶ 408 U.S. 237 (1972) (holding that the imposition of the death penalty in the cases before the Court violated the Eighth and Fourteenth Amendments as "cruel and unusual punishment").

¹⁷ 428 U.S. 153 (1976) (upholding the constitutionality of the death penalty and of a guided discretion statute).

jurisprudence, including Justice Scalia's proposal that the individualized sentencing requirement be jettisoned from the Court's death penalty scheme. While Justice Scalia's proposal has the benefit of being evenhanded, none of the proposals for fixing the scheme results in a system that is both fair and evenhanded. Even if the Court were to adopt Justice Scalia's view that mandatory death sentences are the only fair sentences, the present foundation for such a scheme still allows for arbitrariness through the use of vague statutory aggravating factors, nonstatutory aggravating factors, and victim impact statements. While a true mandatory scheme might eliminate most of those problems, such a harsh system has several historical problems. Perhaps the lesson to be learned, therefore, is the same one learned by Justices Blackmun and Powell after many years: The death penalty cannot be applied in a fair, evenhanded, and constitutional manner.

I. THE DEVELOPMENT OF THE PRINCIPLES OF GUIDED DISCRETION AND INDIVIDUALIZED SENTENCING IN CAPITAL CASES

[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.¹⁸

A. *The Constitutionality of Various Death Penalty Schemes*

The modern era of death penalty jurisprudence began in 1972,¹⁹ although some background information prior to that is informative. In 1791, when the Eighth Amendment was adopted, all of the states followed the common law practice of making death the mandatory sentence for certain offenses.²⁰ A narrowing of the group of murderers sentenced to death occurred in 1794, when Pennsylvania abolished the death penalty for all crimes except "murder of first degree," that is, premeditated killing, for which the death penalty was mandatory.²¹ Although other states followed Pennsylvania's lead, the degree system did not work well in Pennsylvania, and the distinction between degrees of murder in that state practically disappeared.²²

¹⁸ *Woodson*, 428 U.S. at 305 (plurality opinion).

¹⁹ See *Furman*, 408 U.S. 238 (1972).

²⁰ See *Woodson*, 428 U.S. at 289 (citing H. BEDAU, *THE DEATH PENALTY IN AMERICA* 5-6, 15, 27-28 (rev. ed. 1967)).

²¹ See *McGautha v. California*, 402 U.S. 183, 198 (1971) (citing 1794 Pa. Laws 1777).

²² See *id.*

One problem with the mandatory death penalty was that juries, fearful that guilty but sympathetic defendants would be put to death, often would ignore the law and find such defendants not guilty. As the Supreme Court has noted, "[A]t least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict."²³ To address this problem, Tennessee, during the 1837-38 legislative session, became the first state to give juries sentencing discretion in capital cases once they found a defendant guilty of murder.²⁴ Other states and the federal government followed Tennessee's lead.²⁵ On January 15, 1897, Congress passed an act that gave capital juries discretion to qualify a guilty verdict by adding "without capital punishment" to the verdict.²⁶ By 1963, every state that allowed juries to impose a sentence of death also gave the juries discretion to give mercy to a defendant convicted of a capital crime.²⁷

In the middle of the twentieth century, however, states began abandoning the use of the death penalty. Executions in the United States "declined from a highpoint of 199 in 1935" to two in 1967.²⁸ Part of this decline resulted from an increasing reluctance of judges and juries to impose death sentences,²⁹ but another reason was that courts became more willing to review capital cases, resulting in increased pressure on the United States Supreme Court to address the constitutionality of the death penalty.³⁰ Also, because of a growing concern about the unfairness of the application of the death penalty, the NAACP Legal Defense Fund ("Fund") mounted a direct judicial assault on capital punishment in 1966.³¹

Up to this point, the Supreme Court never had directly addressed the constitutionality of the death penalty, although it had upheld a sentence of public execution by shooting in *Wilkerson v. Utah*³² in 1879, and it unani-

²³ *Woodson*, 428 U.S. at 293.

²⁴ See *McGautha*, 402 U.S. at 199-200.

²⁵ See *id.* at 200.

²⁶ See Act of Jan. 15, 1897, ch. 29, § 1, 29 Stat. 487 (1897).

²⁷ See JEFFREY ABRAMSON, *WE THE JURY* 217 (1994). In fact, in 1949, the Court stated:

The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions

Williams v. New York, 337 U.S. 241, 247 (1949).

²⁸ WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*, at 25-26 (1984).

²⁹ See *id.* at 15.

³⁰ See *id.* at 16.

³¹ See *id.*

³² 99 U.S. 130 (1879).

mously had upheld electrocution as a method of execution in *In re Kemmler*³³ in 1890. The Court addressed the question of jury discretion in 1899 when it reversed a murder conviction because the trial judge limited the jury's discretion by instructing that the jury should not recommend mercy unless it found mitigating circumstances.³⁴ In the late 1960s, however, the Fund began broad attacks on death penalty issues on various constitutional grounds.³⁵

The Court finally addressed the constitutionality of the capital punishment system in *McGautha v. California*.³⁶ The Court, like all of the lower courts that had addressed the issue regarding jury discretion,³⁷ rejected the defendants' claim that the Fourteenth Amendment is violated by the absence of standards to guide the jury's discretion in determining whether to impose the death penalty.³⁸ The Court held that due process does not require states to hold separate proceedings in capital cases to determine guilt and punishment or to provide sentencing standards to capital juries.³⁹ Writing for the Court, Justice Harlan stated, "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."⁴⁰

After *McGautha*, the Fund brought a number of other cases and argued that death sentences were cruel and unusual under the Eighth Amendment because of the arbitrary and discriminatory manner in which the death penalty was imposed.⁴¹ Then, in 1972 in *Furman v. Georgia*⁴²—a five-to-four decision that contained nine separate opinions and that was the Court's longest decision ever⁴³—the Court held that the imposition of the death penalty in the three cases before it constituted "cruel and unusual punishment in

³³ 136 U.S. 436 (1890).

³⁴ See *Winston v. United States*, 172 U.S. 303, 313 (1899).

³⁵ See BOWERS, *supra* note 28, at 17; see also *Boykin v. Alabama*, 395 U.S. 238 (1969) (raising the issue that imposing the death penalty for the crime of robbery violated the Eighth Amendment, but remanding the case on other grounds); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (holding that the blanket exclusion of potential jurors who were opposed to the death penalty violated the Fourteenth Amendment).

³⁶ 402 U.S. 183 (1971).

³⁷ See *id.* at 203.

³⁸ See *id.* at 196.

³⁹ See *id.* at 221.

⁴⁰ *Id.* at 204.

⁴¹ See BOWERS, *supra* note 28, at 18.

⁴² 408 U.S. 238 (1972).

⁴³ See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 260 (1981) ("The nine separate opinions totaled 50,000 words, 243 pages—the longest decision in the Court's history.").

violation of the Eighth and Fourteenth Amendments.”⁴⁴ Along with Justices Brennan and Marshall, who both concluded that the death penalty per se violates the Constitution,⁴⁵ the three other Justices in the majority wrote opinions finding capital punishment unconstitutional as it was being administered in America. Justice Douglas held that the system was unconstitutional because it allowed discrimination based on racial and other improper reasons: “The high service rendered by the ‘cruel and unusual’ punishment clause . . . is to require legislatures to write penal laws that are even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.”⁴⁶ Justice Stewart compared the selection of who receives a sentence of death in America to being struck by lightning⁴⁷ and reasoned that the Eighth Amendment does not allow the death penalty “to be so wantonly and so freakishly imposed.”⁴⁸ Justice White found the death penalty unconstitutional because under the system at the time, the death penalty was so infrequently imposed that it was not of substantial service to criminal justice.⁴⁹

In *Furman*, the Court reversed the imposition of the death sentences in the three cases before it, and entered similar orders in 120 other death penalty appeals.⁵⁰ In effect, the Court’s decision prevented the execution of all of the prisoners on death rows in the United States at the time.⁵¹

Because *Furman* did not abolish capital punishment per se, the state legislatures responded to the decision by attempting to develop new death penalty statutes that would pass constitutional muster. Some states responded with mandatory death penalty statutes, again making the death penalty automatic upon the conviction of a specifically defined capital crime.⁵²

⁴⁴ *Furman*, 408 U.S. at 239-40.

⁴⁵ In *Furman*, Justices Brennan and Marshall both concluded that the death penalty violates the Eighth Amendment, and throughout their terms on the bench they continued to dissent in every subsequent case that upheld a death sentence. See *id.* at 305-06 (Brennan, J., concurring); *id.* at 358-59, 360 (Marshall, J., concurring). Justice Brennan, who died on July 25, 1997, continued to criticize the death penalty even after he retired from the bench. In one of his last public appearances, he denounced the death penalty as “barbaric and inhuman punishment that violates our Constitution.” Linda Greenhouse, *William Brennan, 91, Dies; Gave Court Liberal Vision*, N.Y. TIMES, July 25, 1997, at B6 (quoting Justice Brennan).

⁴⁶ *Furman*, 408 U.S. at 256 (Douglas, J., concurring).

⁴⁷ See *id.* at 309 (Stewart, J., concurring).

⁴⁸ *Id.* at 310 (Stewart, J., concurring).

⁴⁹ See *id.* at 313 (White, J., concurring).

⁵⁰ See FRANKLIN E. ZIMRING & GORDAN HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 37 (1989).

⁵¹ See *id.*

⁵² See BOWERS, *supra* note 28, at 174. Prior to *Furman*, every state had abandoned mandatory capital sentencing procedures. See *Sumner v. Shuman*, 483 U.S. 66, 71

Other states responded by passing "guided discretion" statutes that provided sentencing guidelines, which, for example, permitted sentencers to consider explicit aggravating and mitigating circumstances before imposing the death penalty.⁵³ When legal challenges to these schemes reached the Supreme Court in several cases in 1976, the Court struck down the mandatory schemes⁵⁴ and upheld the guided discretion statutes.⁵⁵

In one of these guided discretion cases, *Gregg v. Georgia*,⁵⁶ the plurality began by noting that any interpretation of the Eighth Amendment must consider contemporary values because "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁵⁷ The plurality then held that the death penalty per se does not violate the Constitution and upheld Georgia's guided discretion statute.⁵⁸ The plurality reasoned that the statute satisfied *Furman*'s requirement that "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."⁵⁹ The plurality held that Georgia's statute, which was a bifurcated system that contained specific aggravating and mitigating circumstances for juries to consider, provided "clear and objective standards" and gave adequate guidance to the sentencing authority.⁶⁰

The petitioner argued that Georgia's sentencing scheme still allowed unfettered discretion by means of prosecutorial discretion, a jury's ability to convict of a lesser included offense, and commutation by the governor.⁶¹ The plurality, however, noted that those situations involved removing someone from consideration as a candidate for the death penalty, while *Furman* was concerned with the decision to impose the death penalty.⁶²

(1987).

⁵³ See BOWERS, *supra* note 28, at 174.

⁵⁴ See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

⁵⁵ See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

⁵⁶ 428 U.S. 153 (1976). Justice Stewart, joined by Justices Powell and Stevens, wrote the main opinion in *Gregg*. See *id.*

⁵⁷ *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). "[T]he Clause forbidding 'cruel and unusual' punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Id.* at 171 (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

⁵⁸ See *id.* at 169.

⁵⁹ *Id.* at 189.

⁶⁰ *Id.* at 196-98.

⁶¹ See *id.* at 199.

⁶² See *id.*

Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.⁶³

On the same day, the Court upheld other guided sentencing statutes in *Jurek v. Texas*⁶⁴ and *Proffitt v. Florida*.⁶⁵

In striking down North Carolina's mandatory statute in *Woodson v. North Carolina*,⁶⁶ the same plurality⁶⁷ began by looking at the history of mandatory death penalty statutes in this country and noted again that "[i]t is now well established that the Eighth Amendment draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society.'"⁶⁸ The history of mandatory death penalty statutes, including the regular practice of jury nullification under such statutes, revealed "that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid."⁶⁹ Further, the extreme nature of the punishment of death requires that a sentencer consider the defendant as a unique human being.⁷⁰ The plurality thus struck

⁶³ *Id.* Still, it is difficult for one to distinguish between discretion to impose a death sentence and discretion not to impose a death sentence.

⁶⁴ 428 U.S. 262 (1976).

⁶⁵ 428 U.S. 242 (1976).

⁶⁶ 428 U.S. 280 (1976).

⁶⁷ As in *Gregg*, the guiding opinion in *Woodson* was written by Justice Stewart and joined by Justices Powell and Stevens. *See id.* Justices Brennan and Marshall, maintaining that the death penalty is unconstitutional per se, provided the other votes to find North Carolina's statute unconstitutional. *See id.*

⁶⁸ *Id.* at 301 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

⁶⁹ *Id.* at 293. The plurality further reasoned that mandatory statutes do not address the arbitrariness concerns raised in *Furman* because mandatory statutes often will result in juries using their unbridled discretion by means of jury nullification. *See id.* at 302-03. In dissent, then Justice Rehnquist criticized the plurality's reasoning by noting that the discretion in such a situation is no more arbitrary than the discretion in the guided discretion statutes that the plurality voted to uphold in *Gregg*. *See id.* at 314-15 (Rehnquist, J., dissenting). Justice Rehnquist reasoned that the concern in *Furman* "arose not from the perception that so many capital sentences were being imposed but from the perception that so few were being imposed." *Id.* at 315 (Rehnquist, J., dissenting).

⁷⁰ The *Woodson* plurality explained:

A process that accords no significance to relevant facets of the character and

down the mandatory statute⁷¹ and held that in capital cases "the evolving standards of decency" of the Eighth Amendment "require[]" consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."⁷² On the same day, the Court also struck down Louisiana's mandatory death penalty statute in *Roberts v. Louisiana*.⁷³ The Court reaffirmed these decisions over ten years later in *Sumner v. Shuman*.⁷⁴

B. The Court's Attempt to Eliminate Arbitrariness and Require Individualized Sentencing

1. Eliminating Arbitrariness and Narrowing the Group Eligible for the Death Penalty

The Court's concern with the arbitrary use of the death penalty began, to a large extent, with the three Justices in *Furman* who voted to strike down the statutes, not because the death penalty was per se unconstitutional, but because of the unfairness of the penalty in practice. Justice Douglas, for example, did not argue that the defendants before the Court did not deserve the death penalty. Instead, his concern was that the death penalty was used unfairly on minorities and the poor.⁷⁵ Similarly, Justice Stewart was concerned that being selected for execution was analogous to being struck by lightning.⁷⁶

record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Id. at 304.

⁷¹ See *id.* at 305.

⁷² *Id.* at 304. The foundation for this requirement of individualized sentencing in capital cases, the plurality reasoned, is "that the penalty of death is qualitatively different from a sentence of imprisonment, however long Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 305.

⁷³ 428 U.S. 325 (1976).

⁷⁴ 483 U.S. 66 (1987) (holding that a mandatory death sentence for a prison inmate who was convicted of murder while serving a life sentence without possibility of parole violated the Constitution).

⁷⁵ See *Furman v. Georgia*, 408 U.S. 238, 249-57 (Douglas, J., concurring).

⁷⁶ See *id.* at 309 (Stewart, J., concurring).

The principles of *Gregg* and *Woodson* were elaborated in later cases. Following *Gregg*, in *Godfrey v. Georgia*,⁷⁷ the Court struck down an application of Georgia's death penalty statute because the state court did not give an adequate limiting instruction to the aggravating circumstance that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."⁷⁸ The plurality quoted Justice White's concurring opinion in *Furman* by stating that "[a] capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'"⁷⁹ The plurality explained that a state "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"⁸⁰ Thus, *Gregg* and *Godfrey* established the role of aggravating circumstances as providing clear standards for determining who may receive a death sentence. If those standards are vague, as they were in *Godfrey*,⁸¹ they are unconstitutional.

In several other cases, the Court has stressed its concern that "the death penalty is not meted out arbitrarily or capriciously."⁸² The Court also has stressed that "unbridled discretion" violates the Constitution,⁸³ and that states "must administer [the death] penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not."⁸⁴ The Court also has asserted that "death penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion."⁸⁵

Although the Court has emphasized its concern with arbitrariness in several cases, the Court has retreated from this concern in practice. With respect to aggravating circumstances, the Court most recently has stressed

⁷⁷ 446 U.S. 420 (1980).

⁷⁸ *Id.* at 422 (quoting GA. CODE ANN. § 27-2534.1(b)(7) (1978)).

⁷⁹ *Id.* at 427-28 (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (quoting *Furman*, 408 U.S. at 313 (White, J., concurring))).

⁸⁰ *Id.* at 428 (citations omitted).

⁸¹ *See id.* at 428-29.

⁸² *California v. Ramos*, 463 U.S. 992, 999 (1983).

⁸³ *Penry v. Lynaugh*, 492 U.S. 302, 326 (1989).

⁸⁴ *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

⁸⁵ *California v. Brown*, 479 U.S. 538, 541 (1987). The Court has stressed this concern in several cases. *See, e.g., Mills v. Maryland*, 486 U.S. 367, 374 (1988) (holding that unclear jury instructions, which may have precluded sentencers from considering mitigating factors and resulted in arbitrariness, qualified the case to be remanded for sentencing); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (holding that any mitigating factor must be given some weight in consideration of a death sentence because "a consistency produced by ignoring individual differences is a false consistency").

the "narrowing" aspect of aggravating circumstances.⁸⁶ In other words, as long as not all defendants convicted of murder do not receive death sentences, a statutory scheme probably is constitutional. Similarly, in *Pulley v. Harris*,⁸⁷ the Court displayed less concern with arbitrariness by holding that, in capital cases, state courts are not constitutionally required to compare the sentences awarded to similarly situated defendants.⁸⁸ The Court, however, did indicate that proportionality review might be required if a capital sentencing scheme did not have other constitutional safeguards.⁸⁹

In *Zant v. Stephens*,⁹⁰ the Court emphasized that the purpose behind the use of aggravating circumstances was only to narrow the group of those eligible for the death penalty. In that case, the Court upheld a death sentence that was based upon two valid aggravating factors and one unconstitutionally vague aggravating factor.⁹¹ Under Georgia's capital statute, once a valid aggravating factor was found, the jury had complete discretion to consider other factors in deciding whether to impose the death sentence.⁹² The Court noted that, under Georgia's statute, finding an aggravating factor "does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty."⁹³ In dissent, Justice Marshall

⁸⁶ See, e.g., *Tuilaepa v. California*, 114 S. Ct. 2630, 2635 (1994) (holding that California's death penalty special circumstances, which required sentencers to consider the circumstances of the crime, the defendant's prior criminal activity, and the defendant's age at the time of the crime, were not unconstitutionally vague). In *Tuilaepa*, the Court stated:

As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder Second, the aggravating circumstance may not be unconstitutionally vague.

Id.

⁸⁷ 465 U.S. 37 (1984).

⁸⁸ See *id.* at 50-51.

⁸⁹ See *id.* at 51-54.

⁹⁰ 462 U.S. 862 (1983).

⁹¹ See *id.* at 890-91.

⁹² See *id.* at 878-80.

⁹³ *Id.* at 874. *Zant* involved a state with a "nonweighing" statute. In "nonweighing" states, the sentencer must find statutory aggravating circumstances but does not have to balance these specific factors against mitigating factors. See, e.g., *id.* at 870-72. Some states, however, have a capital sentencing statute that requires the sentencer to "weigh" the aggravating circumstances and the mitigating circumstances together. Under such a weighing statute, nonstatutory aggravating factors and vague aggravating factors cannot be weighed in the sentencing decision. See *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990) (holding that when sentencing error occurs in weighing states, the appellate court must reweigh or perform a harmless-error analysis); see also Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 TEX. L. REV. 441, 447-50 (1994) (discussing the weighing/non-weighing distinction).

called the decision a return to unfettered discretion.⁹⁴

In *Lowenfield v. Phelps*,⁹⁵ a Louisiana petitioner argued that his death sentence should be reversed because the sole aggravating factor was identical to an element of capital murder that "the offender knowingly created a risk of death or great bodily harm to more than one person."⁹⁶ The Court affirmed the death sentence because a constitutionally sufficient narrowing was accomplished at the guilt phase of the trial.⁹⁷ Thus, as long as the narrowing occurred at some point in the process, the aggravating factors, in effect, were irrelevant.

Some commentators have noted that the Court, by embracing the narrowing function of aggravating factors, has abandoned its concern with whether such factors "channel" or guide the sentencer's discretion.⁹⁸ As discussed below, this overall trend of the Court to focus on narrowing instead of on arbitrariness is consistent with the Court's progression toward a more arbitrary death penalty.

2. *The Individualized Sentencing Requirement*

In several cases, the Court followed *Woodson* by reaffirming the importance of mitigating factors. In *Roberts v. Louisiana*,⁹⁹ the Court held that the crime of intentional murder of a police officer could not result in a mandatory death sentence, and in *Sumner v. Shuman*,¹⁰⁰ the Court held that a mandatory death sentence for a murder committed by an inmate serving a life sentence was unconstitutional.

Mr. Hornbuckle notes that of the 36 jurisdictions with the death penalty, 21 are weighing states. See *id.* at 448 n.38. He includes Arizona as a nonweighing state, see *id.* at 447 n.35, but courts have held that Arizona actually is a weighing state. See, e.g., *Richmond v. Lewis*, 506 U.S. 40, 47 (1992) ("Read most naturally, [the Arizona death penalty sentencing statute] requires the sentencer to weigh aggravating and mitigating circumstances—to determine the relative 'substan[ce]' of the two kinds of factors.").

⁹⁴ See *Zant*, 462 U.S. at 910 (Marshall, J., dissenting). Once a threshold finding is made, "the jurors can be left completely at large, with nothing to guide them but their whims and prejudices. . . . Their sentencing decision is to be the product of their discretion and of nothing else." *Id.* (Marshall, J., dissenting).

⁹⁵ 484 U.S. 231 (1988).

⁹⁶ *Id.* at 243 (quoting LA. CODE CRIM. PROC. ANN. art. 905.4(d) (West 1984)).

⁹⁷ See *id.* at 246.

⁹⁸ See, e.g., Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 384 (1995). "The Supreme Court has emphatically disclaimed any separate requirement to channel discretion apart from the requirement that states narrow the class of death-eligible offenders." *Id.* at 379.

⁹⁹ 428 U.S. 325, 335-36 (1976).

¹⁰⁰ 483 U.S. 66, 78 (1987).

The principles of *Woodson* were further elaborated upon in *Lockett v. Ohio*,¹⁰¹ in which the Court found Ohio's death penalty statute unconstitutional because it limited the mitigating factors that sentencers could consider. In *Lockett*, the plurality stressed that the Eighth and Fourteenth Amendments require individualized consideration of mitigating factors.¹⁰² The sentencer must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."¹⁰³ Similarly, in *Eddings v. Oklahoma*,¹⁰⁴ the Court struck down a death sentence stemming from a situation in which the judge thought that he could not give mitigating weight to a defendant's troubled youth.¹⁰⁵ "[T]he rule in *Lockett* recognizes that 'justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'" ¹⁰⁶

Legislatures thus cannot limit the mitigating factors that a sentencer can consider. As discussed below, however, the present scheme of sentencing factors has progressed toward a limit on mitigating factors and a mandatory death penalty system.

C. *The Emergence of a New Jurisprudence*

Throughout these capital cases runs the underlying theme that "there is a significant constitutional difference between the death penalty and lesser punishments."¹⁰⁷ These early cases of modern death penalty jurisprudence thus established two important constitutional principles for capital cases: (1) the sentencing authority must be given clear and objective standards to de-

¹⁰¹ 438 U.S. 586, 608-09 (1978); see also *Skipper v. South Carolina*, 476 U.S. 1 (1986) (holding that the exclusion of evidence that a defendant had adjusted well to incarceration violated *Lockett*).

¹⁰² See *Lockett*, 438 U.S. at 606.

¹⁰³ *Id.* at 604. In *Lockett*, the plurality left open the possibility that a rare capital case may arise in which mitigating factors would need not be considered, such as the case of a prisoner who commits a murder while serving a life sentence. See *id.* at 604 n.11. The Court, however, later held that even in such a situation, mitigating factors must be considered. See *Sumner*, 483 U.S. at 76.

¹⁰⁴ 455 U.S. 104 (1982).

¹⁰⁵ See *id.* at 112-13.

¹⁰⁶ *Id.* at 112 (quoting *Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937)) (omissions in original). The Court added that "[b]y holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency." *Id.*

¹⁰⁷ *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (Stevens, J., plurality opinion).

termine who is eligible for the death penalty and to narrow that group;¹⁰⁸ and (2) the sentencer must be able to consider, as mitigating factors, all aspects of a defendant's character and record as well as the circumstances of the offense.¹⁰⁹

These two principles, channeled discretion and individualized sentencing, have been criticized as being incompatible.¹¹⁰ The main problem, however, is that, in its attempts to follow both principles while reacting to perhaps unanticipated legislative responses, the Court has retreated from both principles. Thus, as discussed throughout this Article, the Court has created a system that has the paradoxical problems of a constitutional sentencing scheme that is somehow both mandatory and arbitrary.

II. THE PROGRESSION TOWARD AN ARBITRARY DEATH PENALTY

There is . . . no Fundamental, but that every Supre[me] Power must be Arbitrary.¹¹¹

Of course, all first-degree murders are horrible. Yet, because the Court has rejected a mandatory death penalty scheme, the Court has attempted to develop a fair system for evaluating each first-degree murder and defendant to determine which defendants receive the death penalty and which ones receive life in prison.

¹⁰⁸ See *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990).

¹⁰⁹ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987) (summarizing the extent of discretion allowed in death penalty cases). In *McCleskey*, the Court stated:

In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

Id.

¹¹⁰ See *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (mem.) (Blackmun, J., dissenting); *Walton v. Arizona*, 497 U.S. 639, 657-66 (1990) (Scalia, J., concurring); see also Markus Dirk Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 BUFF. L. REV. 85, 98 (1993) (discussing the tension between the two principles).

¹¹¹ GEORGE SAVILE, MARQUESS OF HALIFAX, *Political Thoughts and Reflections*, in THE COMPLETE WORKS OF GEORGE SAVILE, MARQUESS OF HALIFAX 214 (Walter Raleigh ed., 1912).

As noted above, in *Godfrey*, the plurality stated that under the Eighth Amendment, "[a] capital sentencing scheme must . . . provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'"¹¹² Since *Godfrey* and the *Furman/Gregg* line of cases, in which the Court clearly was concerned about the arbitrary use of the death penalty, the Court has retreated from this concern. After initially appearing to strictly regulate the use of capital punishment, the Court has withdrawn from its early statements in this area and has permitted a growing arbitrariness that appears inconsistent with the fundamental concerns of *Gregg* and *Furman*. In short, the Court no longer seems concerned with whether the determination of who receives the death penalty parallels getting struck by lightning. This trend is illustrated by the Court's increasing tolerance of vague statutory aggravating factors and open-ended nonstatutory aggravating factors, including victim impact statements.

Several of the Justices have noted continuing problems with arbitrariness in the present capital punishment scheme. Justice Blackmun, who voted to uphold the death penalty in both *Furman* and *Gregg*, eventually concluded that the arbitrariness in imposing the death penalty could not be fixed and that, therefore, the death penalty was unconstitutional.¹¹³ As discussed below, Justice Scalia agreed with Justice Blackmun's conclusion about arbitrariness, but not about the cure.

A. *Unlimited Mitigating Circumstances Create an Unlimited Number of Variables*

In a concurring opinion in *Walton v. Arizona*,¹¹⁴ Justice Scalia concluded that the two underlying principles of modern death penalty jurisprudence—guided discretion and individualized sentencing—are incompatible.¹¹⁵ While accepting the concerns of *Furman*, Justice Scalia rejected the holdings of *Woodson* and *Lockett* that provided for individualized sentencing by requiring that the defendant be allowed to introduce any mitigating evidence.¹¹⁶ He noted that the mitigation requirement "quite obviously de-

¹¹² *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)); accord *Lewis*, 497 U.S. at 774. The Court repeatedly has stressed that the states must narrow the class of defendants eligible for the death penalty in a way that "reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

¹¹³ See *Callins*, 510 U.S. at 1143 (Blackmun, J., dissenting from the denial of the petition for writ of certiorari).

¹¹⁴ 497 U.S. 639 (1990).

¹¹⁵ See *id.* at 656 (Scalia, J., concurring).

¹¹⁶ See *id.* at 671-73. Justice Scalia noted his concern about whether even *Furman*

stroys whatever rationality and predictability the [requirement that states channel the sentencer's discretion with clear and objective standards] was designed to achieve."¹¹⁷ Thus, he concluded that "[t]he mandatory imposition of death—without sentencing discretion—for a crime which States have traditionally punished with death cannot possibly violate the Eighth Amendment."¹¹⁸ He announced he would no longer follow *Lockett* and *Woodson*.¹¹⁹ Although Justice Scalia's position is far from commanding a majority of the Court, Justice Thomas has expressed similar concerns.¹²⁰

As discussed above, although the Court has explained the importance of prohibiting courts from limiting mitigating factors, Justice Scalia is correct that the requirement of unlimited mitigating factors does allow a great deal of sentencing discretion.¹²¹ As the Court has noted in the context of the

was mandated by the Eighth Amendment, but concluded that he was

willing to adhere to the precedent established by [the] *Furman* line of cases, and to hold that when a State adopts capital punishment for a given crime but does not make it mandatory, the Eighth Amendment bars it from giving the sentencer unfettered discretion to select the recipients, but requires it to establish in advance, and convey to the sentencer, a governing standard.

Id. at 671 (Scalia, J., concurring) (citing *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Godfrey v. Georgia*, 446 U.S. 420 (1980)).

¹¹⁷ *Id.* at 664-65 (Scalia, J., concurring). Justice Stevens responded to Justice Scalia's argument by analogizing a state's homicide law to a pyramid with the homicides toward the top being the most serious. *See id.* at 716-18 (Stevens, J., dissenting).

A rule that forbids unguided discretion at the base is completely consistent with one that requires discretion at the apex. After narrowing the class of cases to those at the tip of the pyramid, it is then appropriate to allow the sentencer discretion to show mercy based on individual mitigating circumstances in the cases that remain.

Id. at 718 (Stevens, J., dissenting). In other words, Justice Stevens reasoned that the use of aggravating circumstances serves the constitutional function of narrowing the group of defendants eligible for the death penalty. Once that process is complete, discretion is not prohibited.

¹¹⁸ *Id.* at 671 (Scalia, J., concurring).

¹¹⁹ *See id.* at 673 (Scalia, J., concurring).

¹²⁰ *See Graham v. Collins*, 506 U.S. 461, 493-500 (1993) (Thomas, J., concurring).

¹²¹ The difficulty with Justice Scalia's position, however, is that the discretion that is given to the sentencing authority is not limited to the fact that a defendant must be able to present unlimited mitigating factors. In fact, in several decisions since *Walton*, Justice Scalia's vote has been inconsistent with his opinion in *Walton*. Although he has maintained that mitigating factors are not constitutionally necessary, Justice Scalia has voted to allow consideration of vague aggravating factors and victim impact statements. In voting that the Eighth Amendment does not bar consideration of victim impact statements, Justice Scalia noted that even if the Court were to abandon the requirement that all relevant mitigating evidence be admitted, he still would vote to allow the use of victim impact evidence. *See Payne v. Tennessee*, 501 U.S. 808, 833 (1991) (Scalia, J., concurring).

issue of racial discrimination in capital sentencing, "Of course, 'the power to be lenient [also] is the power to discriminate.'" ¹²²

B. *Overbroad and Vague Aggravating Factors*

Another area of arbitrariness in today's death penalty scheme is the use of vague and broad aggravating circumstances to determine whether an individual should receive a death sentence. The Court has stated that not only must aggravating factors "genuinely narrow the class of persons eligible for the death penalty," ¹²³ they must furnish "'clear and objective standards' that provide 'specific and detailed guidance.'" ¹²⁴ The Court has held that aggravating factors cannot be vague, although when a statutory aggravating factor is facially vague, the state courts may determine a constitutional interpretation and apply it in individual cases. ¹²⁵ Since the Court's attempt in *Godfrey* to uphold the tenets of *Gregg* by requiring that a sentencer's discretion be guided with "clear and objective standards," ¹²⁶ the Court gradually has retreated from this position by tolerating more vagueness than it has in the past. This tendency is best illustrated by the Court's growing tolerance of the much-criticized variations of the "heinous, atrocious, or cruel" aggravating factor and the "future danger" aggravating factor.

¹²² *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (quoting KENNETH C. DAVIS, DISCRETIONARY JUSTICE 170 (1973)) (alteration in original).

¹²³ *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

¹²⁴ *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)).

¹²⁵ See *Godfrey*, 446 U.S. at 428; *Gregg v. Georgia*, 428 U.S. 153, 198 (1976). In addition to the Eighth Amendment problems with vague aggravating circumstances, there is a possible Fourteenth Amendment due process problem because prior to the crime, vague aggravating factors may not give adequate notice to the defendant that they may be used. See *Coleman v. McCormick*, 874 F.2d 1280, 1286-88 (9th Cir.) (en banc) (holding that defense counsel needs to be aware of the aspects of the crime that are being used as aggravating circumstances to support the death sentence in order to have a meaningful opportunity to refute them at trial), *cert. denied*, 493 U.S. 944 (1989); see also *Lankford v. Idaho*, 500 U.S. 110 (1991) (holding that due process was violated when defense counsel did not have adequate notice that the judge might sentence the defendant to death); cf. *Poland v. Stewart*, 117 F.3d 1094 (9th Cir. 1997) (not directly addressing the issue, but containing the State's argument that the purpose of aggravating circumstances is to guide the discretion of the sentencer, not to give notice, and that adequate notice is given by the homicide statute itself).

¹²⁶ *Godfrey*, 446 U.S. at 428; see also *Lewis*, 497 U.S. at 774 (using the *Godfrey* analysis to evaluate sentencer discretion); *Zant*, 462 U.S. at 878 n.16 (analyzing aggravating circumstances in *Godfrey*).

1. *Heinous, Atrocious, or Cruel Aggravating Factor*

Most states with the death penalty require sentencers to consider the aggravating factor, or a variation thereof, that the murder was committed in an "especially heinous, atrocious, or cruel" manner.¹²⁷ Although in *Gregg* and *Proffitt* the Court initially was satisfied that Georgia and Florida, respectively, were applying the "heinousness" factor constitutionally,¹²⁸ the Court noted in both of those cases that the factor potentially was unconstitutionally arbitrary.¹²⁹

In order for the jury's sentencing discretion to be constitutional, it must be guided in such a way that the jurors are not given unfettered discretion.¹³⁰ In *Godfrey*, the Court found that the aggravating factor that the offense "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim,"¹³¹ without further definition, was unconstitutionally vague.¹³² Similarly, in *Maynard v. Cartwright*,¹³³ the Court unanimously found that Oklahoma's application of its "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague.¹³⁴ Although a vague aggravating factor may be made constitutional by a clarifying court definition,¹³⁵ the Court found that the Oklahoma circumstance remained vague

¹²⁷ See *infra* note 348 (listing statutes that contain this aggravating circumstance).

¹²⁸ See *Gregg*, 428 U.S. at 201 (noting that Georgia had limited the factor to "horrible torture murder"); *Proffitt*, 428 U.S. at 255 (noting that Florida had limited the factor to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim"). The Court in *Proffitt*, in upholding the death sentence, also noted that the Florida Supreme Court had reviewed the decision by conducting a proportionality review—comparing the circumstances of the case with other capital cases. See *id.* at 259.

¹²⁹ See *Gregg*, 428 U.S. at 201; *Proffitt*, 428 U.S. at 255-56.

¹³⁰ The Court upheld Florida's "heinous, atrocious, or cruel" aggravating factor in *Proffitt* during the same term it decided *Gregg* and *Woodson*. Significant is the fact that in *Proffitt*, the Court held, as it had in *Gregg* with respect to Georgia's heinousness factor, that the "initial approval [of Florida's factor] was tentative, contingent upon the state courts' adopting constructions narrowing the broad language, and, presumably, contingent upon the state courts' ability to communicate that narrowing construction to capital sentencers in individual cases." Michael Mello & Nell Joslin Medlin, *Espinosa v. Florida: Constitutional Hurricane, Lambent Breeze, or Idiot Wind?*, 22 STETSON L. REV. 907, 934 (1993).

¹³¹ GA. CODE ANN. § 27-2534.1(b)(7) (1978) (current version at GA. CODE ANN. § 17-10-30(b)(7) (1997)).

¹³² *Godfrey*, 446 U.S. at 432-33; see also *Espinosa v. Florida*, 505 U.S. 1079, 1081 (1992) (holding Florida's factor too vague); *Shell v. Mississippi*, 498 U.S. 1, 2 (1990) (reaching the same result with the Mississippi statute); *Walton v. Arizona*, 497 U.S. 639, 654 (1990) (finding Arizona's version of the same factor unconstitutionally vague).

¹³³ 486 U.S. 356 (1988).

¹³⁴ *Id.* at 360.

¹³⁵ See *Godfrey*, 446 U.S. at 428; *Gregg*, 428 U.S. at 198.

despite the trial court's attempt to define it, in part, as "extremely wicked" or "pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others."¹³⁶ In *Maynard*, the Court reasserted that "[s]ince *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."¹³⁷

In other more recent cases, however, the Court has upheld applications of the heinousness factor. In 1990, in *Walton v. Arizona*,¹³⁸ the Court held that Arizona's "'especially heinous, cruel or depraved' aggravating factor" was unconstitutionally vague.¹³⁹ The Court, however, held that a limiting construction given to the aggravating factor by the Arizona courts provided sufficient guidance.¹⁴⁰ Although the Arizona Supreme Court's construction, which the United States Supreme Court approved, explained the vague terms to a degree, the terms of the definitions—including phrases such as "relishing of the murder," "gratuitous violence," and "senselessness of the murders"¹⁴¹—remain open to broad interpretation. Further, the Arizona courts have not consistently followed the approved definitions, reasoning that the approved narrowing definitions are not exclusive and that new ones may be added by the courts.¹⁴² Finally, since the decision in *Walton*, the state courts and the lower federal courts have tolerated broad applications of

¹³⁶ *Maynard*, 486 U.S. at 361-64; see *Cartwright v. Maynard*, 822 F.2d 1477, 1488 (10th Cir. 1987) (quoting the jury instructions given on the aggravating circumstance), *aff'd*, 486 U.S. 356 (1988).

¹³⁷ *Maynard*, 486 U.S. at 362.

¹³⁸ 497 U.S. 639 (1990).

¹³⁹ *Id.* at 654 (quoting ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1989)) (current version at ARIZ. REV. STAT. ANN. § 13-703(F)(6) (West Supp. 1997)).

¹⁴⁰ See *id.* at 652-55; see also *Richmond v. Lewis*, 506 U.S. 40, 47 (1992) (summarizing the evaluation of the Arizona statute in *Walton*); *Lewis v. Jeffers*, 497 U.S. 764, 777-78 (1990) (defending reliance on *Walton* in a later case). The limiting construction was given to the "heinous, cruel or depraved" aggravating circumstance, ARIZ. REV. STAT. ANN. § 13-703(F)(6) (West Supp. 1997), by the Arizona Supreme Court in 1983 in *State v. Gretzler*, 659 P.2d 1 (Ariz. 1983). The Arizona courts interpreted "cruel" to mean that the victim consciously suffered physical pain or mental distress. See, e.g., *State v. Amaya-Ruiz*, 800 P.2d 1260, 1285 (Ariz. 1990). In *Gretzler*, the Arizona Supreme Court explained the factors that constitute "heinous and depraved": "The factors are: (1) whether the killer relished the murder; (2) whether the killer inflicted gratuitous violence on the victim beyond that necessary to kill; (3) whether the killer needlessly mutilated the victim; (4) whether the crime was senseless; and (5) whether the victim was helpless." *State v. Detrich*, 932 P.2d 1328, 1339 (Ariz. 1997) (citing *Gretzler*, 659 P.2d at 10-11).

¹⁴¹ *Gretzler*, 659 P.2d at 11.

¹⁴² See, e.g., *State v. Milke*, 865 P.2d 779, 787 (Ariz. 1993) (holding that the murder of a child by his parent was heinous and depraved).

Arizona's "heinous, cruel or depraved" aggravating factor that occurred prior to the creation of the narrowing construction approved in *Walton*.¹⁴³

In 1993, the Court further retreated from its early concerns about arbitrariness by upholding a definition that was extremely similar to other definitions the Court previously had found unconstitutionally vague. *Arave v. Creech*¹⁴⁴ involved Idaho's aggravating factor that "[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life."¹⁴⁵ The Idaho Supreme Court applied a limiting instruction that required a showing of "the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer."¹⁴⁶ The United States Supreme Court held that the narrowing construction of the factor was constitutional.¹⁴⁷ The Court noted that although "pitiless" alone may not sufficiently narrow the factor, the term "cold-blooded" did provide sufficient narrowing.¹⁴⁸ The Court reasoned that "cold-blooded" means "emotionless" and that some first-degree murderers do exhibit feelings, such as anger; therefore, the aggravating factor was sufficiently narrow.¹⁴⁹

¹⁴³ The inconsistency of the opinions of the United States Supreme Court regarding vague aggravating factors is illustrated by several cases in Arizona. Although the Court has upheld the post-1983 application of Arizona's section 13-703(F)(6) aggravating factor, the Arizona courts had given contradictory opinions regarding the constitutionality of the aggravating circumstance prior to the 1983 *Gretzler* opinion.

In 1994, the Arizona Supreme Court stated that the (F)(6) factor "had not yet been adequately narrowed . . . until *State v. Gretzler*." *State v. Richmond*, 886 P.2d 1329, 1332 n.1 (Ariz. 1994); see *Richmond v. Lewis*, 506 U.S. 40, 52 (1992) (concluding that Arizona's "especially heinous, cruel or depraved" aggravating factor was unconstitutionally vague in 1980). Less than one and one-half years later, however, the Arizona Supreme Court in *State v. Mata* held that the aggravating factor was narrowed prior to *Gretzler*, although the court did not say when it was narrowed. In *Mata*, the court relied mainly upon post-*Gretzler* cases—decided after 1983—in its finding that the statute was sufficiently narrowed when the defendant was sentenced in 1978. See *State v. Mata*, 916 P.2d 1035, 1038-45 (Ariz. 1996), *cert. denied*, 117 S. Ct. 20 (1996).

Further, the confusion regarding the (F)(6) factor is not limited to the state courts. As one Arizona Supreme Court justice noted, the issue "is hardly one about which there has been agreement from the federal bench." *Id.* at 1056 (Zlaket, J., dissenting in part); see, e.g., *Ceja v. Stewart*, 97 F.3d 1246, 1248-49 (9th Cir. 1996) (upholding pre-*Gretzler* applications of Arizona's "heinous, cruel or depraved" aggravating factor). The confusion in Arizona is representative of the problems associated with defining vague terms with other broad terms.

¹⁴⁴ 507 U.S. 463 (1993).

¹⁴⁵ IDAHO CODE § 19-2515(h)(6) (1997).

¹⁴⁶ *Creech*, 507 U.S. at 468 (quoting *State v. Osborn*, 631 P.2d 187, 200 (Idaho 1981)).

¹⁴⁷ See *id.* at 475-76.

¹⁴⁸ See *id.*

¹⁴⁹ See *id.* at 476.

One may wonder why “cold-blooded, pitiless slayer”¹⁵⁰ supplies sufficient constitutional narrowing while “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim”¹⁵¹ does not. Similarly, in Arizona, it is unclear how “senselessness of the murders”¹⁵² provides a constitutional narrowing.

In earlier cases, the Supreme Court seemed more concerned about giving proper guidance to juries to ensure that the application of an aggravating factor provided clear guidelines. The Court was concerned about vague aggravating factors because they could lead to the arbitrary infliction of the death penalty. *Arave*, however, illustrates a shift in the Court’s concern.¹⁵³ The Court practically has abandoned its attempts to eliminate arbitrariness and instead only requires that an aggravating factor potentially eliminate some first-degree murderers.

The “heinous, cruel, or depraved” aggravating factor has been applied broadly. For example, courts have found the aggravating factor present both where the victim died slowly¹⁵⁴—because the victim suffered—and where the defendant used excessive force in killing the victim quickly.¹⁵⁵ Such reasoning leads one to conclude that unless a defendant uses exactly the proper amount of force to kill, then the “heinousness” aggravating factor is satisfied.¹⁵⁶ In those cases, however, the aggravating factor often is found

¹⁵⁰ *Id.* at 468.

¹⁵¹ *Godfrey v. Georgia*, 446 U.S. 420, 422-32 (1980).

¹⁵² *State v. Gretzler*, 659 P.2d 1, 11 (Ariz. 1983).

¹⁵³ In 1992, however, the Supreme Court concluded that Florida’s heinousness aggravating factor was facially vague and that the state’s jury instruction on heinousness (“especially heinous, atrocious, or cruel” means “especially wicked, evil, atrocious or cruel”) was unconstitutionally vague. *Espinosa v. Florida*, 505 U.S. 1079, 1080-81 (1992) (per curiam) (quoting FLA. STAT. ANN. § 921.141(5)(h) (West Supp. 1997)).

¹⁵⁴ See Thomas M. Fleming, Annotation, *Sufficiency of Evidence, For Purposes of Death Penalty, To Establish Statutory Aggravating Circumstance that Murder was Heinous, Cruel, Depraved, or the Like—Post-Gregg Cases*, 63 A.L.R.4th 478, 597-614 (1988).

¹⁵⁵ See *id.* at 502-75.

¹⁵⁶ As one state supreme court chief justice noted:

One becomes death eligible if, hand trembling because of fear, mental illness, or drug use, one fails to aim accurately or kill with the first blow and the victim fortuitously suffers and dies slowly. [See *State v. Chaney*, 686 P.2d 1265, 1282 (Ariz. 1984)] (affirming death penalty in case where the defendant’s gunfire did not kill the victim instantaneously, but, instead, the victim suffered for thirty minutes before losing consciousness and dying). The assassin who senselessly shoots with steady hand and kills in cold blood or uses a weapon with ruthless efficiency and dispatch and causes immediate death does not kill cruelly and may not be death eligible. [See *State v. Johnson*, 710 P.2d 1050, 1052, 1055-56 (Ariz. 1985)] (cruelty not even considered where the defendant shot his sleeping victim, who “rapidly bled to death”). If this, too, is “real science,” its logic escapes me. *State v. Salazar*, 844 P.2d 566, 586 (Ariz. 1992) (Feldman, C.J., concurring).

to be present where the victim anticipated his or her fate.¹⁵⁷ Such applications are consistent with common sense—because all murders are heinous—but such applications are not consistent with the Eighth Amendment objectives of eliminating arbitrariness and narrowing the group of defendants eligible for the death penalty.

Other commentators have noted that the heinousness factor is so broad that it can apply to almost every type of capital homicide. One study concluded that Florida's "heinous, atrocious or cruel" aggravating circumstance as applied "covers virtually every kind of first degree murder imaginable" and that, "to the extent that [limiting principles have been developed], those principles are inconsistently applied" by the state courts.¹⁵⁸ Another commentator has noted the inconsistent application of Arizona's "especially heinous, cruel or depraved" aggravating circumstance.¹⁵⁹ For example, in one case the Arizona Supreme Court found "depravity" based upon the defendant's bragging that the killing showed his "machismo,"¹⁶⁰ but found no "depravity" in another case in which a defendant bragged that the victim "squealed like a rabbit."¹⁶¹ As the Chief Justice of the Arizona Supreme Court confessed, "If there is some 'real science' to separating 'especially' heinous, cruel, or depraved killers from 'ordinary' heinous, cruel, or depraved killers, it escapes me. It also has escaped the court."¹⁶²

2. Future Danger Aggravating Factor

Some jurisdictions employ another sweeping aggravating factor—one that asks the capital sentencer to predict whether the defendant is a future

¹⁵⁷ See Fleming, *supra* note 154, at 575-97.

¹⁵⁸ Michael Mello, *Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523, 551 (1984).

¹⁵⁹ See Terrill Pollman, *Maynard v. Cartwright: Channeling Arizona's Use of the Heinous, Cruel, or Depraved Aggravating Circumstance to Impose the Death Penalty*, 32 ARIZ. L. REV. 193, 204-06 (1990).

¹⁶⁰ *State v. Martinez-Villareal*, 702 P.2d 670, 680 (Ariz. 1985). See generally Pollman, *supra* note 159 (comparing the heinousness provisions of Arizona and Oklahoma).

¹⁶¹ *State v. Graham*, 660 P.2d 460, 463 (Ariz. 1983).

¹⁶² *State v. Salazar*, 844 P.2d 566, 586 (Ariz. 1992) (Feldman, C.J., concurring). For a further discussion of the application of the "especially heinous" aggravating circumstance, see Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 988-89 (1986) ("The circumstance's terms are too vague, too broad, and too subjective to provide any real guidance to a sentencer or a court.").

danger.¹⁶³ Such an aggravating factor has been upheld by the United States Supreme Court.

In *Jurek v. Texas*,¹⁶⁴ a Texas capital jury was asked to determine "whether the evidence established beyond a reasonable doubt that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."¹⁶⁵ Because the jury answered "yes" to that question as well as to another sentencing question, the judge sentenced the defendant to death.¹⁶⁶ The Court rejected the defendant's argument that Texas's statutory scheme did not eliminate the "arbitrariness and caprice of the system held in *Furman* to violate the Eighth and Fourteenth Amendments."¹⁶⁷ With respect to the "continuing threat" question, the Court reasoned that the jury's task in answering the question was "basically no different from the task performed countless times each day throughout the American system of criminal justice."¹⁶⁸

Similarly, in *Barefoot v. Estelle*,¹⁶⁹ the Court rejected the claim that expert testimony on the future dangerousness of the defendant should be excluded from capital trials, noting that "relevant, unprivileged evidence should be admitted and its weight left to the factfinder."¹⁷⁰ Additionally, the Court held that such testimony does not require an examination of the defendant and that it may be given in the form of an answer to a hypothetical.¹⁷¹

At the sentencing hearing in *Barefoot*, the State called Doctors Holbrook and Grigson, neither of whom had examined the defendant or had requested to do so.¹⁷² Both experts testified that they were qualified to predict future dangerousness, and that they were given a hypothetical about Barefoot's background, which included four nonviolent prior offenses, an escape from jail, and the events surrounding the murder for which he was on trial.¹⁷³ Dr. Holbrook testified that for the "Barefoot" in the hypothetical, there was a probability that he would commit criminal acts of violence, and Dr.

¹⁶³ See *infra* note 373 (listing states with "future danger" aggravating circumstances).

¹⁶⁴ 428 U.S. 262 (1976).

¹⁶⁵ *Id.* at 267-68. Texas's capital sentencing statute did not contain a list of statutory aggravating circumstances. See *id.* at 270; TEX. CODE CRIM. P. ANN. art. 37.071 (West Supp. 1975-76). Instead, the sentencing jury was asked to answer specific statutory questions and if their answers were "yes," then the death sentence would be imposed. See *Jurek*, 428 U.S. at 269.

¹⁶⁶ See *id.* at 268.

¹⁶⁷ *Id.* at 274.

¹⁶⁸ *Id.* at 276.

¹⁶⁹ 463 U.S. 880 (1983).

¹⁷⁰ *Id.* at 898.

¹⁷¹ See *id.* at 902-03.

¹⁷² See *id.* at 917 (Blackmun, J., dissenting).

¹⁷³ See *id.* at 918 (Blackmun, J., dissenting).

Grigson testified that there was a "one hundred percent and absolute" chance that "Barefoot" would commit future acts of criminal violence.¹⁷⁴ Although the Court noted "professional doubts about the usefulness of psychiatric predictions," it reasoned that in the adversary process, juries would be able "to separate the wheat from the chaff."¹⁷⁵

Recently, in the context of civil proceedings, the Supreme Court affirmed its belief that future dangerousness may be predicted.¹⁷⁶ The concept of predicting "future dangerousness" in capital sentencing proceedings, however, has been criticized by judges,¹⁷⁷ legal commentators,¹⁷⁸ mental health professionals,¹⁷⁹ and the American Psychiatric Association.¹⁸⁰ One

¹⁷⁴ *Id.* at 919 (Blackmun, J., dissenting).

¹⁷⁵ *Id.* at 901 n.7.

¹⁷⁶ In *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997), the Court upheld Kansas's Sexually Violent Predator Act, which provides for the civil commitment of people with a "mental abnormality" or "personality disorder" that are "likely to engage in predatory acts of sexual violence." *Id.* at 2076 (quoting KAN. STAT. ANN. § 59-29a01 *et seq.* (1994)).

¹⁷⁷ See, e.g., *Barefoot*, 463 U.S. at 916 (Blackmun, J., dissenting); *White v. Estelle*, 554 F. Supp. 851, 858 (S.D. Tex. 1982) (expressing "serious reservations about the use of psychiatric predictions based on hypotheticals"); *People v. Murtishaw*, 631 P.2d 446, 466 (Cal. 1981) (holding that the trial court erred in permitting a psycho-pharmacologist to testify concerning a capital defendant's future conduct in prison because expert predictions of future dangerousness are unreliable and prejudicial); see also *Williamson v. Reynolds*, 904 F. Supp. 1529, 1569-71 (E.D. Okla. 1995) (granting writ of habeas corpus in a capital case in which the statutory aggravating circumstance of future dangerousness, without guidance on the definition of the language of the statute, was unconstitutionally vague), *modified on other grounds*, 110 F.3d 1508 (10th Cir. 1997).

¹⁷⁸ See George E. Dix, *Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations*, 19 AM. CRIM. L. REV. 1 (1981) (concluding that the use of psychiatric predictions in capital sentencing proceedings presents problems of reliability assessment for juries and violates evidentiary and constitutional standards); William Green, *Capital Punishment, Psychiatric Experts, and Predictions of Dangerousness*, 13 CAP. U. L. REV. 533 (1984) (arguing that psychiatric predictions of future dangerousness are unreliable because experts are not in agreement on how to define dangerousness); Shelley Clarke, Note, *A Reasoned Moral Response: Rethinking Texas's Capital Sentencing Statute After Penry v. Lynaugh*, 69 TEX. L. REV. 407 (1990) (stating that future dangerousness is an inappropriate consideration because it rests on predicting human behavior).

¹⁷⁹ See, e.g., Mark David Albertson, *Can Violence Be Predicted? Future dangerousness: The testimony of experts in capital cases*, 3 CRIM. JUST., Winter 1989, at 18, 20-21 (noting that in a survey of several hundred practicing psychiatrists, clinical psychologists, and mental health lawyers, the mean estimate of the percentage of accurate dangerousness predictions was less than half) (citing Lynn R. Kahle & Bruce D. Sales, *Due Process of Law and the Attitudes of Professionals Toward Involuntary Civil Commitment*, in NEW DIRECTIONS IN PSYCHOLOGICAL RESEARCH (Paul D. Lipsett & Bruce D. Sales eds., 1980)).

¹⁸⁰ In *Barefoot*, the American Psychiatric Association filed an amicus curiae brief

prosecutor has noted that "[t]he clinical research on prediction of future violence has consistently demonstrated that psychiatrists and other mental health professionals are very poor at predicting future dangerousness."¹⁸¹ One psychologist, because of the unreliability of such predictions, proposed an ethical ban on predictions of dangerousness by psychiatrists and psychologists in the capital sentencing context.¹⁸²

The use of the "future danger" aggravating factor as a tool for determining who receives the death penalty is highly suspect. Jurors tend to trust experts, and it is questionable whether they really are able to "separate the wheat from the chaff"¹⁸³ on this issue. Even ignoring the potential unreliability of testimony from mental health professionals, every first-degree

noting that "[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession." *Barefoot*, 463 U.S. at 920 (Blackmun, J., dissenting) (quoting Amicus Curiae Brief for the American Psychiatric Association at 12, *Barefoot* (No. 82-6080)). Justice Blackmun noted that "[t]he APA's best estimate is that two out of three predictions of long-term future violence made by psychiatrists are wrong." *Id.* (Blackmun, J., dissenting).

Further, "[t]he American Psychiatric Association's Task Force on Clinical Aspects of the Violent Individual has said that, 'the state of the art regarding predictions of violence is very unsatisfactory. The ability of psychiatrists or any other professionals to reliably predict future violence is unproved.'" Albertson, *supra*, note 179, at 18-20 (citing AMERICAN PSYCHIATRIC ASS'N, CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL 30 (1974)).

¹⁸¹ Albertson, *supra* note 179, at 20. "Professor John Monahan surveyed the major studies of clinical prediction of future dangerousness and found the results to show that psychiatrists had about a one in three chance of predicting future dangerousness correctly." *Id.* (citing JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 1 (1981)).

¹⁸² See Charles P. Ewing, "Dr. Death" and The Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings, 8 AM. J.L. & MED. 407 (1983). A psychology professor also noted the potential ethical problem:

First, it is conceivable that the legal system might ask mental health professionals to offer such predictions [of dangerousness] even knowing that they have no special predictive abilities or expertise. In this case, however, mental health professionals would be ethically prohibited from offering such predictions or assessing risk

Less clear, however, is whether mental health professionals are ethically proscribed from engaging in such assessments and offering opinions to the courts where mental health professionals have *some* predictive ability, but when such predictions or assessments are subject to significant error, as the research suggests is the case.

Randy K. Otto, *On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature*, 18 LAW & PSYCHOL. REV. 43, 66-67 (1994).

¹⁸³ *Barefoot*, 463 U.S. at 901 n.7.

murder defendant reasonably could be found to be a future danger because he has been convicted of murder.

Two specific examples highlight some of the problems with the future danger aggravating factor. Dr. James Grigson, who was one of the experts who testified in *Barefoot*, has been strongly criticized for his testimony in Texas cases that he is "one-hundred percent" accurate in predicting future dangerousness even where he has not examined the individuals in question.¹⁸⁴ Because of alleged ethics violations arising from his testimony regarding future dangerousness, Dr. Grigson was expelled from the American Psychiatric Association and from the Texas Society of Psychiatric Physicians in 1995.¹⁸⁵ The expulsion, perhaps, was too late for many defendants. Between 1966 and 1994, Dr. Grigson had appeared in capital cases approximately 150 times for the state and eight times for the defense.¹⁸⁶ By 1989, he had testified regarding the future dangerousness issue in the cases of one-third of all Texas death row inmates.¹⁸⁷

The second specific example of some of the problems with predicting future dangerousness is the case of Wilbert Evans. In March 1984, Wilbert Evans was resentenced to death in Virginia for the shooting death of a deputy sheriff.¹⁸⁸ At the hearing, in support of the aggravating factor of future dangerousness,¹⁸⁹ the prosecution submitted charges, which had never been tried, that Evans had shot a man in an argument over a card game and had held a disciplinary committee at bay with a knife.¹⁹⁰ In response, the defense presented evidence from others, including prison guards and officials, that Evans was well-behaved, hardworking, and cooperative.¹⁹¹ After delib-

¹⁸⁴ See Laura Beil, *Groups Expel Psychiatrist Known for Murder Cases; Witness Nicknamed "Dr. Death" Says License to Practice Won't Be Affected by Ethics Allegations*, DALLAS MORNING NEWS, July 26, 1995, at 21A.

¹⁸⁵ See *id.* The American Psychiatric Association issued a statement saying that Dr. Grigson violated the group's ethics code by "arriving at a psychiatric diagnosis without first having examined the individuals in question, and for indicating, while testifying in court as an expert witness, that he could predict with 100 percent certainty that the individuals would engage in future violent acts." *Id.*; see also Richard H. Underwood, "X-Spurt" Witnesses, 19 AM. J. TRIAL ADVOC. 343, 386 (1995) (citing Paul C. Giannelli, "Junk Science": The Criminal Cases, 84 J. CRIM. L. & CRIMINOLOGY 105, 114 (1993)).

¹⁸⁶ See Bruce Vincent, *Dr. Death's Demise?—Prosecutors Shun Death Penalty Expert*, LEGAL TIMES, Jan. 1, 1996, at 4. Dr. Grigson's record in helping prosecutors obtain death sentences earned him the nickname, "Dr. Death." See *id.*

¹⁸⁷ See *id.* Dr. Grigson also testified in "the notorious case of Randall Dale Adams, whose wrongful conviction for killing a police officer in 1976 inspired the documentary 'The Thin Blue Line.'" *Id.*

¹⁸⁸ See Stuart Taylor, Jr., *We Will Kill You Anyway*, AM. LAW., Dec. 1990, at 54.

¹⁸⁹ See VA. CODE ANN. § 19.2-264(C) (Michie 1990).

¹⁹⁰ See Taylor, *supra* note 188, at 60-61.

¹⁹¹ See *id.*

erations, the jury sentenced Evans to death based only upon the aggravating circumstance of future dangerousness.¹⁹²

A few months after the sentencing, however, an event occurred that revealed that the jurors may have made an inaccurate prediction. At the prison where Wilbert Evans was held, six other Virginia death row inmates attempted to escape, taking hostage twelve prison guards and two female nurses.¹⁹³ "According to uncontested affidavits presented by guards taken hostage during the uprising, Evans took decisive steps to calm the riot, saving the lives of several hostages, and preventing the rape of one of the nurses."¹⁹⁴ Several guards noted that they owed their lives to Evans, who worked to calm the situation, warning the prisoners not to hurt the hostages, and releasing the hostages once the escapees left.¹⁹⁵ The courts, however,

¹⁹² See *Evans v. Muncy*, 498 U.S. 927, 927 (1990) (Marshall, J., dissenting).

¹⁹³ See *id.* at 928 (Marshall, J., dissenting).

¹⁹⁴ *Id.* (Marshall, J., dissenting).

¹⁹⁵ See Taylor, *supra* note 188, at 56-57.

Typical of the accounts appended to Evans's last appeal were these:

* A state police report quoted a nurse saying Evans had appeared and "ordered" two prisoners to stop after they had made her strip, tied her to a bed, and begun to assault her sexually. They stopped. . . .

* A guard named Ricardo Holmes said in an affidavit that the ringleaders had talked of killing him and other hostages. "Had it not been for Evans, I might not be here today," Holmes maintained.

* Guard Harold Crutchfield said in an affidavit that Evans "was doing what he could to aid the hostages. . . . It is also my firm belief that if Evans had not been present during the escape, things may have blown up and people may have been harmed. . . . Evans is a model inmate. . . . He poses no risk of harm to any correctional officer."

* Lieutenant Milton Crutchfield told state police, "None of us might [have] been alive today" but for the efforts of four inmates, including Evans, who "played a great part in our safety and release."

* A former prison food service supervisor named Edgar Brummell, who spoke to hostages right after the escape, said in an affidavit that "Evans put his life on the line in May 1984 when he stuck his neck out for the hostages" and that otherwise they "probably would have been killed."

* E.B. Harris, a sergeant at Mecklenburg, wrote Governor Wilder last month that Evans "saved some of the officers from harm and almost certain death" during the 1984 escape, and "has shown me and the majority of the staff nothing but respect" over the years.

* Willie Lloyd Turner, a prisoner who joined Evans in protecting the hostages, told state police that Evans had warned those seeking to escape, "There will be no killing and there will be no raping. You have gotten what you want, now go."

Id. at 57. Evans's attorneys had substantial difficulties in obtaining corroboration of the events that occurred during the breakout because the State blocked their attempts to obtain the State's investigative reports. See *id.* Evans's lawyers finally were able to obtain the reports from another inmate's lawyer 23 hours before Evans was executed. See *id.*

would not consider the challenge to the future dangerousness finding based upon evidence that arose after the sentencing.¹⁹⁶ On October 17, 1990, Wilbert Evans died in Virginia's electric chair.¹⁹⁷

There are arguments favoring the execution of Mr. Evans and disregarding his actions during the escape. On the one hand, he was convicted of murder.¹⁹⁸ If courts were to permit consideration of post-sentence evidence, executions would never occur because people continuously change. Courts constantly would be forced to reevaluate death sentences.¹⁹⁹ On the other hand, Wilbert Evans showed that he was condemned to death based upon an incorrect finding by the jury that he was a future danger.

This illustration is consistent with what several mental health experts conclude about the arbitrariness of the future danger aggravating factor. One may ask who was right about whether Wilbert Evans constituted a future danger—the sentencing jury or the people he saved a few months later. In the end, perhaps they both were correct to some extent, but the disparity illustrates the problem with predicting someone's future behavior and using that as a basis for determining whether that person should be locked up for the rest of his life or executed. Because "future danger" is such a broad aggravating circumstance, society should question whether a prediction of a defendant's "future danger" should play a role in a capital punishment sentencing scheme that must avoid arbitrariness.

3. Conclusion

Although statutory aggravating factors must be well defined, in practice, some of them have resulted in inconsistent application of the death penalty. One commentator has claimed that "the evolution of the role of the statutory aggravating factor has been concomitant with the creation and realization of a tangible, viable constitutional construct for states to follow when effectuating capital punishment policy."²⁰⁰ As discussed above, however, such a conclusion seems contrary to practice.²⁰¹

¹⁹⁶ See *Evans*, 498 U.S. at 930 (Marshall, J., dissenting).

¹⁹⁷ See Taylor, *supra* note 188, at 55-56.

¹⁹⁸ Every murder, however, cannot satisfy the "future danger" aggravating circumstance because then no narrowing would occur as required. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987) (stating that "the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold").

¹⁹⁹ See, e.g., Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U. L. REV. 395, 396 (1990) ("Determining when someone is the same person now as a person who existed before is a central philosophical problem.").

²⁰⁰ Christian D. Marr, Note, *Criminal Law: An Evolutionary Analysis of the Role of Statutory Aggravating Factors in Contemporary Death Penalty Jurisprudence—From Furman to Blystone*, 32 WASHBURN L.J. 77, 103 (1992).

²⁰¹ See Steiker & Steiker, *supra* note 98, at 373-75 (arguing that death-eligibility is

C. Nonstatutory Aggravating Factors

The federal government²⁰² and some states²⁰³ allow the sentencing authority to consider nonstatutory aggravating factors, that is, aggravating factors approved by the individual court in a specific case but not listed in the jurisdiction's death penalty statute. Although at least one statutory aggravating factor also must be present before a defendant may be sentenced to death, the consideration of nonstatutory aggravating factors increases the potential for arbitrariness in capital cases by allowing an unlimited number of considerations to be presented to the sentencing authority.

In *Barclay v. Florida*,²⁰⁴ the Court held that

[a]lthough a death sentence may not rest *solely* on a nonstatutory aggravating factor, . . . the Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime.²⁰⁵

In *Barclay*, the Florida judge considered the defendant's criminal record a nonstatutory aggravating factor.²⁰⁶ The Supreme Court concluded that while the consideration of that factor may have violated state law, it did not violate the defendant's Eighth and Fourteenth Amendment rights.²⁰⁷

In *Zant v. Stephens*,²⁰⁸ in addressing the use of an invalid aggravating factor, the Court noted that the use of nonstatutory aggravating factors is

broad under the current scheme because of broad aggravating factors and because the Court has placed no limit on the number of aggravating factors). "[T]he continuing failure of states to narrow the class of the death-eligible invites the possibility that some defendants will receive the death penalty in circumstances in which it is not deserved according to wider community standards . . ." *Id.* at 375.

²⁰² See 18 U.S.C. § 3592(c) (1994).

²⁰³ Some states, however, are "weighing" states, and sentencers in those states may not consider nonstatutory aggravating factors. See Hornbuckle, *supra* note 93 (discussing the weighing/nonweighing distinction and listing states with each type of statute). Also, in the "weighing" states, the sentencer may not consider an invalid aggravating factor. See *Espinoza v. Florida*, 505 U.S. 1079 (1992); see also discussion *supra* note 93.

²⁰⁴ 463 U.S. 939 (1983).

²⁰⁵ *Id.* at 966-67 (citation omitted).

²⁰⁶ See *id.* at 944-45.

²⁰⁷ See *id.* at 956.

²⁰⁸ 462 U.S. 862 (1983).

permissible to provide for individualized sentencing.²⁰⁹ The Court explained that statutory aggravating factors "play a constitutionally necessary function"²¹⁰ in determining the class of persons eligible for the death penalty, "[b]ut the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death."²¹¹

Since *Barclay* and *Zant*, courts have permitted sentencers to consider a wide range of nonstatutory factors. For example, a number of courts permit the sentencing body to weigh the "nature and circumstances of the crime."²¹² The sentencer may consider an unlimited range of events under such a nonstatutory aggravating circumstance. For example, in *State v. Clark*,²¹³ the sentencing judge wrote several pages about the particular circumstances and details surrounding the deaths of the victims in upholding this nonstatutory aggravating circumstance.²¹⁴ In *State v. Manley*,²¹⁵ the Delaware Superior Court permitted the use of several nonstatutory aggravating circumstances, including the fact that one of the defendant's motives for committing the robbery that led to the murder was to pay a debt that he owed to a Philadelphia gang.²¹⁶ In *Mathenia v. Delo*,²¹⁷ the Eighth Circuit Court of Appeals upheld the jury's consideration of several nonstatutory aggravating factors, including the fact that the defendant was a twenty-five-year-old male and the two victims were females over seventy years old.²¹⁸ In *United States v. McCullah*,²¹⁹ a federal capital case, the United States Court of Appeals for the Tenth Circuit upheld the use of the nonstatutory

²⁰⁹ *See id.* at 879.

²¹⁰ *Id.* at 878.

²¹¹ *Id.*

²¹² *See State v. Gumm*, 653 N.E.2d 253, 262 (Ohio 1995) (holding that a court may rely upon the nature and circumstances of the crime as a reason for supporting a finding that the aggravating circumstances outweigh the mitigating circumstances), *cert. denied*, 116 S. Ct. 1275 (1996); *State v. Nichols*, 877 S.W.2d 722, 731 (Tenn. 1994) (holding that the jury's consideration of "the nature and circumstances of the crime," as allowed by the state statute, was proper) (quoting TENN. CODE ANN. § 39-13-204(c) (1997)), *cert. denied*, 513 U.S. 1114 (1995); *Tamme v. Commonwealth*, 759 S.W.2d 51, 54-55 (Ky. 1988) (holding that a court's consideration, in reviewing a jury's sentencing decision, of nonstatutory aggravating factors that the "murders were heinous" and "prompted by greed and lust" was allowed).

²¹³ No. IN94-06-0543, 1995 Del. Super. LEXIS 25 (Del. Super. Ct. Jan. 5, 1995) (affirming a sentence of death and upholding the consideration of six nonstatutory aggravating circumstances).

²¹⁴ *See id.* at *9-27.

²¹⁵ No. 9511007022, 1997 Del. Super. LEXIS 5 (Del. Super. Ct. Jan. 10, 1997).

²¹⁶ *See id.* at *22, *43.

²¹⁷ 975 F.2d 444 (8th Cir. 1992).

²¹⁸ *See id.* at 451.

²¹⁹ 76 F.3d 1087 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1699 (1997).

aggravating circumstance of "use of a deadly weapon."²²⁰ The court reasoned that because not all murders are committed with a deadly weapon, "this factor genuinely narrows the class of defendants eligible for the death penalty and aids in individualized sentencing."²²¹

Courts also have upheld the use of "lack of remorse" as a nonstatutory aggravating circumstance.²²² As one court has explained, however, "[l]ack of remorse is a subjective state of mind, difficult to gage [sic] objectively since behavior and words don't necessarily correlate with internal feelings."²²³ Further, "[i]n a criminal context, [lack of remorse] is particularly ambiguous since guilty persons have a constitutional right to be silent, to rest on a presumption of innocence and to require the government to prove their guilt beyond a reasonable doubt."²²⁴ For example, the aggravating factor may be misapplied if a truly remorseful defendant did not testify at trial, but, to protect himself when placed in a threatening jail environment, boasted to another inmate, who did testify.

Perhaps the broadest of the nonstatutory aggravating factors relating to the offense is the factor of whether the defendant "committed the offenses charged in the indictment," which was upheld in *McCullah*.²²⁵ In that case, the court recognized that the factor allowed the jury to consider the circumstances surrounding the crime, including the fact that the "murder was committed in furtherance of an illegal drug operation."²²⁶ The court in *McCullah* noted that the Supreme Court in *Lowenfield v. Phelps*²²⁷ held that it was "permissible to count an element of the underlying offense as an

²²⁰ See *id.* at 1107; see also *United States v. Bradley*, 880 F. Supp. 271, 284, 287 (M.D. Pa. 1994) (upholding the nonstatutory aggravating circumstance that a deadly weapon (a handgun) was used during the commission of the crime: "Once again, the court is not convinced that aggravating factors must *per se* perform a narrowing function.").

²²¹ *McCullah*, 76 F.3d at 1107 (citations omitted).

²²² See *United States v. Nguyen*, 928 F. Supp. 1525, 1541-42 (D. Kan. 1996) (upholding the use of lack of remorse as a nonstatutory aggravating factor while cautioning trial courts that the factor must not implicate the defendant's constitutional right to remain silent).

²²³ *United States v. Davis*, 912 F. Supp. 938, 946 (E.D. La. 1996) (holding that evidence regarding lack of remorse was insufficient in that case without addressing whether lack of remorse is "*per se* an inappropriate [nonstatutory aggravating] factor").

²²⁴ *Id.* at 946.

²²⁵ *McCullah*, 76 F.3d at 1108 (quoting 21 U.S.C. § 848(n)(7) (1994)). Although the court found that this nonstatutory aggravating factor, by itself, did not violate the Constitution, it did find that the factor was duplicative of the statutory aggravating factor of whether the defendant "intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in death of the victim." *Id.* at 1111 (quoting 21 U.S.C. § 848(n)(1)(C) (1994)).

²²⁶ *Id.* at 1108.

²²⁷ 484 U.S. 231, 246 (1988).

aggravating factor where the 'narrowing' function is performed at the guilt phase."²²⁸ Thus, the court in *McCullah* reasoned, "an aggravating factor that does not add anything above and beyond the offense is constitutionally permissible provided that the statute itself narrows the class of death-eligible defendants."²²⁹

In addition to the various circumstances surrounding the offense, courts have permitted the consideration of other nonstatutory aggravating circumstances. Several courts have permitted the consideration of the defendant's prior record—including juvenile convictions and crimes for which the defendant was never convicted—as a nonstatutory aggravating circumstance.²³⁰ For example, in *Wright v. State*,²³¹ the Delaware Supreme Court held that the defendant's occupation as a drug dealer for several years was admissible as a nonstatutory aggravating factor, along with two other such factors.²³²

In addition to looking at prior acts, some courts have permitted the consideration of the defendant as a future threat to society as a nonstatutory aggravating factor.²³³ Several of the problems with "future danger" as an

²²⁸ *McCullah*, 76 F.3d at 1107 (citing *Lowenfield*, 484 U.S. at 246).

²²⁹ *Id.* at 1108 (citing *Lowenfield*, 484 U.S. at 246).

²³⁰ *See id.* at 1106 (citing the nonstatutory aggravating factor of previous convictions of "two or more state or federal offenses punishable by imprisonment for more than one year"); *United States v. Bradley*, 880 F. Supp. 271, 284, 286-87 (M.D. Pa. 1994) (upholding the nonstatutory aggravating factor of two prior unindicted murders allegedly committed by the defendant); *State v. Pirtle*, 904 P.2d 245, 267 (Wash. 1995) (holding that "juvenile convictions for both misdemeanors and felonies may be admitted as nonstatutory aggravating evidence in the sentencing phase of a capital trial"), *cert. denied*, 116 S. Ct. 2568 (1996); *State v. Parker*, 886 S.W.2d 908, 924 (Mo. 1994) (holding that the defendant's prior guilty plea to assault, including surrounding facts regarding a sexual abuse charge that was dropped, is admissible as a nonstatutory aggravating factor), *cert. denied*, 514 U.S. 1098 (1995); *Wright v. State*, 633 A.2d 329, 341 (Del. 1993) (upholding the nonstatutory aggravating factor of defendant's arrest for assault in shooting a young boy even though the defendant was not convicted of that crime), *cert. denied*, 116 S. Ct. 2509 (1996); *State v. Jones*, 396 S.E.2d 309, 317 (N.C. 1990) (holding that criminal offenses punishable by more than 60 days of confinement allegedly committed by the defendant could be considered as nonstatutory aggravating factors even though the defendant had never been tried or convicted of those crimes), *cert. denied*, 513 U.S. 1003 (1994).

²³¹ 633 A.2d 329 (Del. 1993).

²³² *See id.* at 340.

²³³ *See United States v. Spivey*, 958 F. Supp. 1523, 1534 (D.N.M. 1997) (denying a motion to strike nonstatutory aggravating factors and allowing the consideration of the nonstatutory aggravating factor of future dangerousness based upon the defendant's "criminal record, other acts and threats of violence and his low potential for rehabilitation"); *United States v. Nguyen*, 928 F. Supp. 1525, 1542 (D. Kan. 1996) (in federal death penalty case, upholding the use of the nonstatutory aggravating factor that "[t]he defendant represents a continuing danger to the lives and safety of others in the future"); *United States v. Perry*, No. 92-474, 1994 U.S. Dist. LEXIS 20462, at *15 n.8

aggravating factor are discussed above in the context of the statutory version of this factor.²³⁴

The number of categories of potential nonstatutory aggravating factors is unlimited. In *State v. Gattis*,²³⁵ the Delaware Superior Court sentenced the defendant to death after considering several nonstatutory aggravating circumstances, including the defendant's lack of respect toward authority as shown by his military record and his behavior while on probation for pleading guilty to assault charges.²³⁶ In *McCullah*,²³⁷ the court upheld the consideration of several nonstatutory aggravating circumstances, including the fact that repeated attempts to rehabilitate the defendant were unsuccessful.²³⁸ In *United States v. Bradley*,²³⁹ one of the nonstatutory aggravating factors presented was that the government was "unaware of any evidence which would constitute 'mitigating factors.'"²⁴⁰

Courts have considered numerous nonstatutory aggravating circumstances. These factors generally have some relevance in sentencing, and courts that permit consideration of nonstatutory aggravating circumstances require findings of at least one statutory aggravating circumstance.²⁴¹ Also, unlike the *McGautha* days, the use of unlimited nonstatutory aggravating and nonstatutory mitigating circumstances—because they are defined by the trial

(D.D.C. Jan. 11, 1994) (in federal death penalty case, rejecting defendant's challenges to 11 nonstatutory aggravating factors, including that "there is a probability that the defendant would commit additional criminal acts of violence so that he would constitute a continuing threat to society in the future").

²³⁴ See *supra* notes 163-99 and accompanying text.

²³⁵ No. IN90-05-1017, 1992 Del. Super. LEXIS 474 (Del. Super. Ct. Oct. 29, 1992).

²³⁶ See *id.* at *22-24.

²³⁷ 76 F.3d 1087 (10th Cir. 1996).

²³⁸ See *id.* at 1108. "The fact that Mr. McCullah continued to commit crimes after his release from prison indicates that prison failed to deter Mr. McCullah's future criminal conduct." *Id.*; see also *State v. Clark*, No. IN94-06-0543, 1995 Del. Super. LEXIS 25, at *53, *62 (Del. Super. Ct. Jan. 5, 1995) (affirming a sentence of death and upholding the consideration of five nonstatutory aggravating circumstances, including the defendant's record while incarcerated, which "is clearly not the kind of prison record reflective of one who is bent on rehabilitation and self-improvement"); cf. *Nguyen*, 928 F. Supp. at 1543-44 (holding that the "low potential for rehabilitation" nonstatutory aggravating factor was duplicative of the "future dangerousness" factor).

²³⁹ 880 F. Supp. 271 (M.D. Penn. 1994).

²⁴⁰ *Id.* at 284.

²⁴¹ See *Barclay v. Florida*, 463 U.S. 939, 966-67 (1983) (holding that the Constitution did not prohibit consideration of nonstatutory aggravating factors although a death sentence could not "rest solely on a nonstatutory aggravating factor"); *Zant v. Stephens*, 462 U.S. 862 (1983) (suggesting that statutory aggravating factors define the class of persons eligible for the death penalty and that a jury may consider nonstatutory aggravating factors to determine which defendants within that class will be sentenced to death).

court—results in the sentencing body having a list of specific factors to consider.

The problem, however, is that open-ended consideration of relevant nonstatutory aggravating factors adds a substantial amount of arbitrariness to the equation. First, unlike statutory aggravating factors, nonstatutory factors are not determined by the elected legislatures, so nonstatutory factors are not applied in the cases of all capital defendants in the state. Instead, much depends on the creativity of the prosecutor to raise and style the nonstatutory aggravating circumstances. Depending on the prosecutor and the court, a prior juvenile record of a twenty-two-year-old defendant may be raised as a nonstatutory aggravating circumstance of prior record, failed attempts to rehabilitate, and/or future dangerousness. Second, the addition of more factors to an already large pool of statutory aggravating circumstances has given juries and sentencing judges broad discretion in imposing the death penalty, in contrast with the focused and channeled discretion foreseen in *Gregg* and *Godfrey*.²⁴²

One of the justifications for allowing a prosecutor to present nonstatutory aggravating factors is that if the Constitution requires that a defendant's presentation of mitigating factors not be limited, then aggravating factors should not be so limited.²⁴³ It is important to note, however, that while the Constitution requires that a defendant be able to present all mitigating factors, the Court has not held that the Constitution requires that the prosecutor be able to present all possible aggravating factors. The Court's holding in *Barclay* was only that states may permit the prosecutor to present nonstatutory aggravating factors.²⁴⁴ The Court thus has reasoned that nonstatutory aggravating factors, which are permitted, are not as constitutionally significant as nonstatutory mitigating factors, which are required.²⁴⁵

²⁴² Indeed, in several of the cases in which courts have permitted consideration of nonstatutory aggravating circumstances, the courts have allowed a large number of such factors to be considered. See, e.g., *Nguyen*, 928 F. Supp. at 1538 (five nonstatutory aggravating factors); *Bradley*, 880 F. Supp. at 271 (finding two out of seven proposed nonstatutory aggravating factors duplicative of statutory aggravating factors); *United States v. Perry*, No. 92-474, 1994 U.S. Dist. LEXIS 20462, at *15 (D.D.C. Jan. 11, 1994) (in a federal death penalty case, the Government argued 11 nonstatutory aggravating factors); *State v. Manley*, No. 9511007022, 1997 Del. Super. LEXIS 5, at *22 (Del. Super. Ct. Jan. 10, 1997) (eight nonstatutory aggravating circumstances).

²⁴³ See *Barclay*, 463 U.S. at 966-67.

²⁴⁴ See *id.* In fact, the Court's distinction between which statutes allow for nonstatutory aggravating factors ("nonweighing statutes") and those that do not ("weighing statutes") is somewhat technical, and it is difficult to believe that the legislators intentionally drafted statutes to allow or not to allow nonstatutory aggravating factors. See Marcia A. Widder, Comment, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial*, 68 TUL. L. REV. 1341, 1356-71 (1994); see also *supra* notes 90-94 and accompanying text.

²⁴⁵ See *Barclay*, 463 U.S. at 966-67.

Although there is no constitutional basis for requiring nonstatutory aggravating factors, there is a constitutional basis for prohibiting the use of nonstatutory aggravating factors: *Furman* and *Gregg*, which held that the Constitution abhors arbitrariness in capital sentencing.²⁴⁶ Justice Scalia has stated that the requirement that sentencing bodies be permitted to consider all nonstatutory mitigating factors "quite obviously destroys whatever rationality and predictability" *Furman* attempted to achieve.²⁴⁷ That problem is exacerbated by also permitting consideration of nonstatutory aggravating factors. By allowing an unlimited number of potential nonstatutory aggravating factors, courts are approaching the days of unfettered jury discretion.

D. *Victim Impact Statements*

A variation of the use of nonstatutory aggravating circumstances is the admission of victim impact statements. One of the most extreme digressions from the Court's early concern about arbitrariness in capital cases involves its rulings regarding victim impact statements. In a period of only two years, the Court reversed its position on the admissibility of victim impact statements at sentencing.

In 1987, the Court held in *Booth v. Maryland*²⁴⁸ that it violated the Constitution to allow victim impact statements of: (1) personal characteristics of victims and the emotional impact of the crimes on victims' families; and (2) family members' opinions and characterizations of the crimes and the defendant. At trial, the prosecutor read a written victim impact statement that included comments from family members of the elderly victims.²⁴⁹ The victims were described as loving parents and grandparents, and a son and a daughter stated how they had been unable to sleep since the murders and discussed other effects of the murders.²⁵⁰

The Court in *Booth* concluded that to the extent that victim impact evidence presents information about which the defendant was unaware and that did not affect the decision to kill, such evidence has nothing to do with the "blameworthiness of a particular defendant."²⁵¹ In finding the admission of such evidence unconstitutional, the Court stressed that such evidence distracts the jury from the evidence surrounding the defendant and the circumstances of the crime and "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner."²⁵² The Court also

²⁴⁶ See discussion *supra* notes 42-63 and accompanying text.

²⁴⁷ *Walton v. Arizona*, 497 U.S. 639, 664-65 (1990) (Scalia, J., concurring).

²⁴⁸ 482 U.S. 496 (1987).

²⁴⁹ See *id.* at 499-500.

²⁵⁰ See *id.* at 500-01.

²⁵¹ *Id.* at 505.

²⁵² *Id.* at 504.

expressed concern that the focus of the sentencing hearing could shift from the defendant to a "mini-trial" of the victim's character.²⁵³

The Court reaffirmed *Booth* in 1989 in *South Carolina v. Gathers*.²⁵⁴ In *Gathers*, during the capital sentencing phase, the prosecutor read to the jury from a religious tract the victim was carrying called "The Game Guy's Prayer."²⁵⁵ The prosecutor then commented on the tract and a voter registration card the victim carried, inferring personal qualities about the victim.²⁵⁶ The Supreme Court held that the contents of the cards were not relevant to the circumstances of the crime: "As in *Booth*, '[a]llowing the jury to rely on [this information] . . . could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill.'"²⁵⁷

In 1991, however, the Court overruled a major portion of *Booth* and *Gathers* in *Payne v. Tennessee*,²⁵⁸ holding that the Eighth Amendment did not bar the admission of evidence about the victim's personal characteristics and the emotional impact of the murder on the victim's family.²⁵⁹ In *Payne*, the petitioner was convicted of murdering a woman and her two-year-old daughter.²⁶⁰ During the sentencing phase of the trial, the State called the grandmother of the woman's three-year-old son to testify that the child missed his mother and sister.²⁶¹ During argument, the prosecutor commented on the murder's continuing effects on the child and the victim's family.²⁶²

This time, the Supreme Court rejected the holdings of *Booth* and *Gathers*, reasoning that "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities."²⁶³ The Court stressed that the State has a legitimate interest in countering the defendant's mitigating evidence by showing that the victim also is an individual and "a unique loss to society."²⁶⁴ The

²⁵³ See *id.* at 507.

²⁵⁴ 490 U.S. 805 (1989).

²⁵⁵ See *id.* at 808-09.

²⁵⁶ See *id.*

²⁵⁷ *Id.* at 811 (quoting *Booth*, 482 U.S. at 505).

²⁵⁸ 501 U.S. 808 (1991). In *Payne*, the Court did not address the admissibility of victim statements about the crime and the appropriate punishment for the defendant. Under *Booth*, therefore, the Eighth Amendment still prohibits the admission of such evidence in capital cases. See *Booth*, 482 U.S. at 508-09.

²⁵⁹ See *Payne*, 501 U.S. at 827.

²⁶⁰ See *id.* at 808.

²⁶¹ See *id.*

²⁶² See *id.*

²⁶³ *Id.* at 825.

²⁶⁴ *Id.* (quoting *Booth*, 482 U.S. at 517 (White, J., dissenting)).

Court concluded that it was "now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant."²⁶⁵ The Court thus held that "the Eighth Amendment erects no *per se* bar" to such evidence.²⁶⁶

The Court's quick reversal on this issue further supports the argument that the Court has retreated from its concern about general arbitrariness. The Court stated its reasoning in terms of a concern for individualized sentencing,²⁶⁷ and individualized sentencing concerns generally sway the capital punishment scheme toward arbitrariness. This time, however, the Court's individualized sentencing concerns overly shifted the scheme toward arbitrariness. Although society obviously should have concern for victims of violent crime, the criminal justice system is not served when the sentencing of a criminal defendant can be substantially affected by differentiating the value of different victims.

For example, by allowing victim impact evidence, it is more likely that a defendant who killed a popular person with a large family would receive the death penalty than would a defendant who killed a homeless person. The Court was unpersuasive in trying to address this argument.²⁶⁸ The whole purpose of individualizing the defendant in capital cases is to invite such comparisons among defendants in determining whether they deserve the death penalty. Similarly, individualizing the victim in capital cases in large part serves the same purpose in inviting such comparisons among vic-

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 827. *Payne* was a 6-3 decision that included some strong language by the Justices in their opinions. Justice Marshall, in a dissenting opinion joined by Justice Blackmun, criticized the majority for disregarding precedent only because the personnel of the Court had changed since *Booth*: "Power, not reason, is the new currency of this Court's decisionmaking." *Id.* at 844 (Marshall, J., dissenting). Justice Stevens, in a dissenting opinion also joined by Justice Blackmun, criticized the Court's new rule because it "permits the sentencer to rely on irrelevant evidence in an arbitrary and capricious manner." *Id.* at 863 (Stevens, J., dissenting). Justice Stevens concluded by referring to the pressure of public opinion on the Court and stating, "Today is a sad day for a great institution." *Id.* at 867 (Stevens, J., dissenting).

²⁶⁷ *See id.* at 820-21.

²⁶⁸ The Court stated:

As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be.

Id. at 823. By focusing on the "uniqueness" of the victim, however, the Court does encourage a disparity in sentencing based upon the qualities of the victim.

times.²⁶⁹ Further, especially in light of studies that show that defendants accused of killing white victims are more likely to receive a death sentence than those who kill minorities,²⁷⁰ the Court should have been more concerned about permitting comparisons among victims.

The Court's analogy—that victim impact evidence should be admitted because mitigating evidence is admitted²⁷¹—fails. It is difficult for jurors to understand why a person would commit a horrible murder. Mitigating factors introduced by the defendant help to attempt to explain what led the defendant to commit the crime. Because of jurors' natural revulsion to such

²⁶⁹ "Evidence offered to prove such differences [among victims] can only be intended to identify some victims as more worthy of protection than others." *Id.* at 866 (Stevens, J., dissenting). As one commentator noted:

Victim impact statements permit, and indeed encourage, invidious distinctions about the personal worth of victims. In this capacity, they are at odds with the principle that every person's life is equally precious, and that the criminal law will value each life equally when punishing those who grievously assault human dignity.

Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 406 (1996).

²⁷⁰ See generally *McCleskey v. Kemp*, 481 U.S. 279 (1987) (recognizing a study that indicated that the Georgia death penalty was imposed more often on black defendants who killed white victims than on others). Also, a study by the federal government found:

Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision.

In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.

.....
The evidence for the influence of the race of defendant on death penalty outcomes was equivocal. Although more than half of the studies found that race of defendant influenced the likelihood of being charged with a capital crime or receiving the death penalty, the relationship between race of defendant and outcome varied across studies.

.....
To summarize, the synthesis supports a strong race of victim influence. The race of offender influence is not as clear cut and varies across a number of dimensions. Although there are limitations to the studies' methodologies, they are of sufficient quality to support the synthesis findings.

U.S. GEN. ACCOUNTING OFFICE, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES*, United States General Accounting Office Report to Senate and House Committees on the Judiciary (GAO/GGD-90-57) 5-6 (Feb. 1990) (footnotes omitted).

²⁷¹ See *Payne*, 501 U.S. at 825.

crimes, it is necessary to allow the defendant the full opportunity to explain his actions and their causes. Ultimately, the jurors must go through the logical process of weighing the importance of such information to determine the full culpability of the capital defendant. Victim impact evidence, however, is different. Such evidence is highly emotional and, naturally, causes people to have an automatic desire for revenge.

Further, most victim impact evidence will have no logical connection to a defendant's culpability because the defendant likely does not know about such information before committing the crime.²⁷² Yes, the murderer should know that a victim may have loved ones who will suffer from the loss of the victim. The jury will know that general information also. The murderer, however, often does not know the specific information about the victim, so such specific information is not relevant to the defendant's culpability.²⁷³ As Justice Stevens noted in dissent in *Payne*, in cases where victim impact evidence makes a difference,

defendants will be sentenced arbitrarily to death on the basis of evidence that would not otherwise be admissible because it is irrelevant to the defendants' moral culpability. The Constitution's proscription against the arbitrary imposition of the death penalty must necessarily proscribe the admission of evidence that serves no purpose other than to result in such arbitrary sentences.²⁷⁴

²⁷² Victim impact evidence encompasses a broad range of information. The Virginia Supreme Court recently held that victim impact evidence is not limited to evidence from the victim's family members. In *Beck v. Commonwealth*, 484 S.E.2d 898 (1997), the trial court received in evidence letters from the victim's coworkers, as well as news stories and essays about the death penalty. The court stated that "the circumstances of the individual case will dictate what evidence will be necessary and relevant, and from what sources it may be drawn." *Id.* at 905.

²⁷³ Furthermore, victim impact evidence does not further the sentencing goals of retribution, deterrence, incapacitation, or rehabilitation. See William Hauptman, *Lethal Reflection: New York's New Death Penalty and Victim Impact Statements*, 97 N.Y.L. SCH. J. HUM. RTS. 439, 478-79 (1997). The Court's decision in *Payne* has generated considerable criticism. See, e.g., Abraham Abramovsky, *Victim Impact Statements: Adversely Impacting Upon Judicial Fairness*, 8 ST. JOHN'S J. LEGAL COMMENT. 21 (1992) (asserting that victim impact statements detract from the fairness of the sentencing process); Aida Alaka, *Victim Impact Evidence, Arbitrariness, and the Death Penalty: The Supreme Court Flipflops in Payne v. Tennessee*, 23 LOY. U. CHI. L.J. 581 (1992) (opposing the Court's ruling in *Payne*); Hauptman, *supra*, at 475-84. But see Martha Hoffman, Note, *Victim Impact Statement*, 10 W. ST. U. L. REV. 221, 227 (1983) (asserting that victim impact statements help victims).

²⁷⁴ *Payne*, 501 U.S. at 866 (Stevens, J., dissenting); see Alaka, *supra* note 273, at 582; Bandes, *supra* note 269, at 406.

For example, suppose a defendant were to shoot and kill a convenience store clerk during a robbery. There would be little doubt that the defendant's chance of receiving the death penalty would be much greater if the victim were a church-going, Boy Scout leader with three children than if the victim were an unmarried orphan with a criminal record.

Not only does the admission of victim impact statements increase the arbitrariness of the death penalty, it also broadens the death penalty and contributes to the Court's progression toward a mandatory death penalty. Because one must be in favor of the death penalty to serve as a juror,²⁷⁵ it is hard to imagine such a juror not being moved to vote for the death penalty if the focus shifts to surviving family members.²⁷⁶ Once again, under the Court's present aggravating and mitigating factor scheme, arbitrariness is further tolerated in the sense that it broadens the application of the death penalty.²⁷⁷

E. *An Additional Note: Arbitrariness Between Jurisdictions*

Because each jurisdiction creates its own death penalty statute, each statute is unique. The result is that—not only does punishment differ between death penalty jurisdictions and jurisdictions without the death penalty—significant discrepancies exist among the death penalty jurisdictions. The list of aggravating circumstances in one state may differ substantially from the list in other states. For example, Virginia has two aggravating factors²⁷⁸ while Pennsylvania has seventeen.²⁷⁹ In some states, but not in others, a person becomes death eligible for killing a child.²⁸⁰

²⁷⁵ See *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (reversing a death sentence where the jury was chosen by excluding for cause veniremen with general objections to the death penalty); *Wainwright v. Witt*, 469 U.S. 412 (1985) (holding that jurors may be excluded if their opposition to capital punishment substantially impairs the performance of their duties).

²⁷⁶ There are several arguments in favor of allowing victim impact evidence, including giving the victim's family an outlet and reminding society of the life that was taken. Not one of these reasons, however, supports the abandonment of Eighth Amendment principles regarding a fair sentencing hearing.

²⁷⁷ For example, while holding that victim evidence is admissible, the Court also has held that the trial judge may instruct the jury not to give in to its sympathy for the defendant. See *California v. Brown*, 479 U.S. 538, 541-43 (1987) (upholding a jury instruction that the jury must not "be swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling'"); see also *Bandes*, *supra* note 269, at 410.

²⁷⁸ See VA. CODE ANN. § 19.2-264.2 (Michie 1995).

²⁷⁹ See 42 PA. CONS. STAT. ANN. § 9711 (West Supp. 1997).

²⁸⁰ See *infra* note 378 (citing statutes that make a defendant eligible for the death penalty if the victim is under a certain age).

Furthermore, similar aggravating circumstances may differ or states may interpret them differently. Even in those states with aggravating circumstances for killing children, the aggravating circumstances vary with regard to the age that the child must be for the aggravating circumstance to be considered. In New Jersey, an aggravating factor applies when the victim is under fourteen years old,²⁸¹ while in South Carolina, the victim must be eleven years old or younger for the aggravating factor to apply.²⁸²

One may imagine a defendant who commits ten different types of murders in ten different states. Depending on which murder occurred in which state, the defendant could end up being eligible for anywhere from zero to ten death sentences.

The Supreme Court, however, has never indicated that the Eighth Amendment requires consistency among the states in their use of the death penalty. It is unlikely that the Court would consider the differences between states in evaluating the arbitrariness of the death penalty, yet it is not unprecedented for the Court to review what the state legislatures are doing with respect to capital punishment. In several cases, in examining the constitutionality of applying the death penalty to certain classes of defendants, the Court has used the legislative enactments of the states to interpret "evolving standards of decency" for Eighth Amendment purposes.²⁸³ For example, in determining whether it violates the Eighth Amendment to impose the death penalty upon a certain type of offender, such as defendants under a certain age, the Court has considered the number of states that apply the death penalty to that type of offender.²⁸⁴ Still, it appears that the Court would be concerned about differences between the states only if the differences were severe and if the differences applied to an entire class of defendants. At present, it appears that the Court finds no constitutional significance in the fact that state legislatures have designated different crimes as deserving of the death penalty.

²⁸¹ See N.J. STAT. ANN. § 2C:11-3 (West Supp. 1997).

²⁸² See S.C. CODE ANN. § 16-3-20 (Law Co-op. Supp. 1996).

²⁸³ See, e.g., *Tison v. Arizona*, 481 U.S. 137 (1987) (applying the death penalty to felony murder defendants with reckless indifference to the value of human life); *Enmund v. Florida*, 458 U.S. 782 (1982) (applying the death penalty to a felony murder defendant who did not kill or intend that a killing take place); *Coker v. Georgia*, 433 U.S. 584 (1977) (applying the death penalty to a defendant convicted of rape but not of murder).

²⁸⁴ See, e.g., *Stanford v. Kentucky*, 492 U.S. 361 (1989) (applying the death penalty to defendants who were 16 and 17 years old at the time of the offenses); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (applying the death penalty to a defendant who was 15 years old at the time of the offense).

F. Conclusion

Arguments that the death penalty is arbitrary have focused greatly on the constitutional requirement that mitigating factors not be limited.²⁸⁵ As discussed above, however, several arbitrary factors, i.e., aggravating factors, enter into the equation on the other side of the scale.²⁸⁶

The Court has become increasingly less concerned with the arbitrariness of the death penalty. The Supreme Court death penalty cases, beginning with *Furman* and *Gregg*, have placed heavy emphasis on the constitutional requirement that the death penalty not be imposed arbitrarily. The Court, however, perhaps because of a realization that its goals of eliminating arbitrariness cannot be met without a mandatory death penalty scheme, began tolerating more and more arbitrariness.

Perhaps the decision in which the Court most clearly illustrated its retreat from its concerns about arbitrary infliction of the death penalty is *McCleskey v. Kemp*,²⁸⁷ in which the Court held that the Constitution tolerates general racial discrimination in capital sentencing. In that case, Warren McCleskey, who was black, was convicted of killing a white police officer during a robbery.²⁸⁸ During habeas corpus proceedings, McCleskey submitted a statistical study that showed a disparity in the imposition of the death penalty in Georgia based on the race of the murder victim and, to a lesser extent, on the race of the defendant.²⁸⁹ Considering various factors, the study concluded that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence than were defendants charged with killing black victims.²⁹⁰

The Court rejected McCleskey's claim that the Georgia capital punishment system was arbitrary and capricious in application and therefore violated the Eighth Amendment.²⁹¹ The Court reasoned that the procedures for determining a defendant's guilt and sentence were fair, while stressing the necessity for jury discretion.²⁹² The Court stated that "it is the jury's

²⁸⁵ See, e.g., *Callins v. Collins*, 510 U.S. 1141, 1144-45 (1994) (Blackmun, J., dissenting from the denial of the petition for writ of certiorari); *Graham v. Collins*, 506 U.S. 461, 479-84 (1993) (Thomas, J., concurring); *Walton v. Arizona*, 497 U.S. 639, 664-65 (1990) (Scalia, J., concurring); see also Betty B. Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 N.Y.U. L. REV. 811, 827 (1995) ("Although we can determine objectively whether a person has committed the acts that make him eligible for the death penalty, whether actually to impose it is a subjective decision.").

²⁸⁶ See *supra* Parts II.B-E.

²⁸⁷ 481 U.S. 279 (1987).

²⁸⁸ See *id.* at 283.

²⁸⁹ See *id.* at 286-87.

²⁹⁰ See *id.* at 287.

²⁹¹ See *id.* at 308.

²⁹² See *id.* at 313 ("Where the discretion that is fundamental to our criminal process

function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'"²⁹³

In upholding the apparent arbitrariness of the death penalty, the Court in *McCleskey* focused on the fact that the discrepancy in sentencing resulted from discretionary leniency, i.e., the fact that mitigating factors cannot be limited.²⁹⁴ The discretion discussed in this Article, however, is not limited to discretionary leniency, but includes discretion to impose the death sentence. Apparently, therefore, while the Court's decisions increasingly have tolerated all types of discretion, the only type of discretion that the Court has explicitly embraced is discretion not to impose the death sentence. It is only through these case-by-case decisions that the Court has allowed increased discretion that is inconsistent with the principles of *Furman* and *Gregg*.

As will be discussed later, one commentator has argued that the Court has never been concerned with arbitrariness per se in capital cases.²⁹⁵ This commentator is correct in that recent decisions, in effect, illustrate the Court's decreasing attempts to eliminate arbitrariness. Later cases progressively have stressed "narrowing" as opposed to eliminating arbitrariness.²⁹⁶ In *McCleskey*, for example, without mentioning arbitrariness, the Court stressed that there were two guiding Eighth Amendment principles in capital cases:

First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that *narrow* the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. . . . Second, States cannot limit the sentencer's consideration of any relevant cir-

is involved, we decline to assume that what is unexplained is invidious.").

²⁹³ *Id.* at 311 (quoting HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 498 (1966)).

²⁹⁴ The Court stressed that one of the principles determining the "constitutionally permissible range of discretion" is that "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty." *McCleskey*, 481 U.S. at 305-06. In *McCleskey*, the Court also noted that the Court in *Gregg* stressed that inherent discretion is a result of "opportunities for discretionary leniency." *Id.* at 307 (quoting *Gregg v. Georgia*, 428 U.S. 153, 199 (1976)).

²⁹⁵ See David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?*, 24 FLA. ST. U. L. REV. 545, 548 (1997) ("The correct view, I will contend, is that the Court has had only one primary goal for its regulation of capital punishment: decreasing overinclusion . . .").

²⁹⁶ See *infra* notes 398, 433-36 and accompanying text.

cumstance that could cause it to decline to impose the penalty.²⁹⁷

Still, beginning with *Furman*, the Court did stress its concerns with arbitrariness.²⁹⁸ Today, the Court still acknowledges a concern about arbitrariness, and it is mainly in its results that the Court has appeared to abandon such a concern. In other words, as long as not all murderers are condemned, the Court has divorced itself from regulating whether the death penalty is applied consistently.

The post-*Furman* cases have not solved the problem of the pre-*Furman* death penalty system in theory or in practice. As one commentator has noted: "New capital punishment laws, supposedly designed to prevent arbitrariness and discrimination, were upheld by the Supreme Court in 1976. But race and poverty continue to determine who dies."²⁹⁹

Arbitrariness in the scheme of sentencing factors is not caused by any one problem, but by a combination of factors, including vague sentencing guidelines and practically unlimited sentencing discretion. It is the accumulation of these problems, as well as others, that undermines the system.³⁰⁰

²⁹⁷ *McCleskey*, 481 U.S. at 305-06 (emphasis added).

²⁹⁸ See, e.g., *Sumner v. Shuman*, 483 U.S. 66, 70 (1987) (noting that *Furman* struck down unguided discretion statutes because they "resulted in the death penalty's being arbitrarily and capriciously imposed, in violation of the Eighth and Fourteenth Amendments").

²⁹⁹ Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 434 (1995) (footnote omitted). This criticism of the death penalty even has appeared in popular song. See STEVE EARLE AND THE DUKES, *Billy Austin, on THE HARD WAY* (MCA Records 1990):

But there's twenty-seven men here
Mostly black, brown and poor
Most of 'em are guilty
Who are you to say for sure?

³⁰⁰ This Article focuses on the capital sentencing scheme of aggravating and mitigating factors developed by the Court, but other commentators argue that there are other problems contributing to the arbitrariness of who is selected to be executed. Because the punishment is not administered fairly and impartially, the American Bar Association, for example, recently called for a nationwide moratorium on the use of the death penalty until

jurisdiction[s] implement policies and procedures that are consistent with . . . longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, and in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

See SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, AMERICAN BAR ASS'N, RESOLUTION 107 RECOMMENDATION para. 1 (1997) (as approved by the ABA House of Delegates February 3, 1997). The ABA called for the moratorium for several reasons,

The Court has not adequately addressed individual problems and has ignored system-wide problems. The Supreme Court's failure to require state legislatures and courts to develop clear lines has resulted in the modern arbitrary use of capital punishment.

III. THE PROGRESSION TOWARD A MANDATORY DEATH PENALTY

[W]hoever has committed Murder, must die³⁰¹

Although today the death penalty is arbitrarily applied in various ways, the death penalty system also is moving closer to a mandatory scheme. The death penalty is not applied to every murderer, but the death penalty system is creeping closer and closer to such a goal, through political pressures and through the Court's failure to address the trend.

The Supreme Court clearly has held that mandatory death penalty schemes are unconstitutional.³⁰² The trend in legislatures to broaden death penalty statutes, as well as some of the Court's more recent cases, however,

including the poor quality of legal representation of indigent capital defendants and the discrimination in capital sentencing on the basis of race, and because Congress and the Court have substantially limited capital defendants' access to the courts. *See id*; *see also* Callins v. Collins, 114 S. Ct. 1127, 1137-38 (1994) (Blackmun, J., dissenting from the denial of the petition for writ of certiorari) (noting that federal courts have abandoned their role in reviewing death sentences); Louis D. Bilonis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1315 (1997) ("Modern capital punishment practice presents opportunities for arbitrary variations in outcome owing to the relative skill and performance of defense counsel that are, quite literally, extraordinary."); Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679 (1990) (noting that poor representation and procedural bars to review have resulted in the arbitrary infliction of the death penalty); Jeffrey L. Kirchmeier, *Drinks, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425 (1996) (citing examples of capital defense attorneys who were impaired by alcohol or drugs during trial); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 333 (1995) (noting "the chronic and severe underfunding of indigent defense services by state and local governments throughout the United States"); Marcia Coyle et al., *Trial and Error in the Nation's Death Belt: Fatal Defense Fatal Flaws*, NAT'L L.J., June 11, 1990, at 30 (discussing poor representation in capital cases); *supra* note 270 (quoting a recent study by the federal government about the effects of race in capital sentencing).

³⁰¹ IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 198 (W. Hastie trans., Augustus M. Kelley Publishers 1974) (1887), *quoted in* Morgan v. Illinois, 504 U.S. 719, 752 n.6 (1992) (Scalia, J., dissenting).

³⁰² *See* Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 333-36 (1976) (plurality opinion).

illustrate a progression toward a mandatory system of capital punishment. Although it is a paradox to claim that the growing arbitrariness of the application of the death penalty is resulting in a progression toward a mandatory system, that is precisely what is happening. It appears that the Court has become exhausted with regulating this area of the law and therefore has allowed a broadening of the application of the death penalty. This trend is illustrated by the Court's willingness to allow mitigating factors to be limited and by the Court's tolerance for broad statutes that include numerous and open-ended sentencing factors.

A. *Limitations on Mitigating Factors*

In the early Supreme Court opinions that addressed limitations on the consideration of mitigating factors, the Court's language was sweeping in the condemnation of limits put upon consideration of mitigating evidence offered by defendants.³⁰³ The Court, however, retreated from this position in *Johnson v. Texas*.³⁰⁴

In *Johnson*, the Court addressed Texas's capital sentencing statute, which does not list aggravating and mitigating factors.³⁰⁵ Instead, the jury in *Johnson* was asked during the capital sentencing phase to answer two special issues in accordance with the statute: (1) whether Johnson's conduct was "committed deliberately and with the reasonable expectation that the death of the deceased or another would result,"³⁰⁶ and (2) whether there was a probability that Johnson "would commit criminal acts of violence that would constitute a continuing threat to society."³⁰⁷ The court instructed the jury that if it answered "yes" to both questions, the court would sentence

³⁰³ In *Woodson*, the Court stated that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304. Two years later, the Court reiterated the important role of mitigating circumstances: "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (Burger, C.J., plurality opinion). *Lockett* was reaffirmed three years later: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982).

³⁰⁴ 509 U.S. 350 (1993).

³⁰⁵ See TEX. CODE CRIM. P. ANN. art. 37-0711(b) (West 1981). The statute has since been amended to allow for consideration of mitigating factors. See TEX. CRIM. P. CODE ANN. § 37.071(b)(1) (West Supp. 1997).

³⁰⁶ *Johnson*, 509 U.S. at 354.

³⁰⁷ *Id.*

Johnson to death; otherwise, the court would sentence him to life in prison.³⁰⁸ Both answers were “yes,” and Johnson was sentenced to death.³⁰⁹

Johnson was nineteen at the time of the murder,³¹⁰ and the issue before the Supreme Court was “whether the Texas special issues allowed adequate consideration of petitioner’s youth.”³¹¹ Looking at previous decisions in which the Court had addressed Texas’s special issues,³¹² the Court held that under the future dangerousness issue, there was “no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of petitioner’s youth.”³¹³ Although the jury could factor Johnson’s age into the future danger question, Johnson argued that the jury’s consideration of the mitigating factor was unconstitutionally limited because the jury was not allowed to consider how youth affected his culpability.³¹⁴

The Court, however, upheld the death sentence.³¹⁵ It reasoned that *Lockett* and *Eddings* require only “that a jury be able to consider in some manner all of a defendant’s relevant mitigating evidence,”³¹⁶ not that “a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant.”³¹⁷ The Court thus implied that a state could limit the consideration of mitigating factors as long as the factors could be considered in at least one way.³¹⁸

³⁰⁸ See *id.*

³⁰⁹ See *id.*

³¹⁰ See *id.* at 350.

³¹¹ *Id.* at 367.

³¹² See *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989) (holding that Texas’s special issues of deliberateness and future danger did not give the capital jury the ability to give effect to mitigating evidence of the defendant’s mental retardation); *Franklin v. Lynaugh*, 487 U.S. 164, 178 (1988) (holding by a plurality that the future dangerousness special issue allowed the jury to give effect to the mitigating circumstance of the defendant’s good prison disciplinary record); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (finding by a plurality that Texas’s statute did not violate the Eighth and Fourteenth Amendments). In none of these prior cases, however, did a majority of the Court hold that a state could constitutionally limit a sentencer’s ability to give effect to mitigating evidence. See *Johnson*, 509 U.S. at 383-85 (O’Connor, J., dissenting).

³¹³ *Johnson*, 509 U.S. at 368.

³¹⁴ See *id.* at 369.

³¹⁵ See *id.* at 371-72.

³¹⁶ *Id.* at 372.

³¹⁷ *Id.*

³¹⁸ The majority opinion in *Johnson*, however, contains some language implying that the statute is constitutional because juries will use their own good sense and give full consideration to mitigating evidence despite the limiting jury instruction.

The crucial term employed in the second special issue—“continuing threat to society”—affords the jury room for independent judgment in reaching its decision. Indeed, we cannot forget that “a Texas capital jury deliberating over the Special Issues is aware of the consequences of its answers, and is likely to weigh mitigating evidence as it formulates these answers in a manner similar to that employed

This holding is contrary to the rule developed from *Lockett* and *Eddings*.³¹⁹ In *Eddings*, the Court had specifically noted how a defendant's youth may be mitigating in more than one way.³²⁰ In *Johnson*, however, the Court indicated a willingness to permit states to limit the consideration of mitigating factors, thus giving jurors less ability to sentence a defendant to life imprisonment instead of death.³²¹

The Court has put other limits on the consideration of mitigating evidence.³²² As this Article was being prepared for publication, the Court de-

by capital juries in 'pure balancing' states."

Id. at 370-71 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 182 n.12 (1988)). It seems somewhat odd that the Court justified its opinion in upholding a jury instruction, in part, by concluding that the jury would disregard its limitations anyway.

³¹⁹ In *Johnson*, Justice O'Connor wrote a dissenting opinion that was joined by Justices Blackmun, Stevens, and Souter, stressing the "considerable support in our early cases for the proposition that the sentencer in a capital case must be able to give full effect to all mitigating evidence concerning the defendant's character and record and the circumstances of the crime." *Id.* at 379 (O'Connor, J., dissenting).

³²⁰ In *Eddings*, the Court noted:

The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults. *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)) (footnotes omitted). Furthermore, the Court quoted the *Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders*:

"Crimes committed by youths . . . deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth."

Id. at 115 n.11 (quoting FRANKLIN ZIMRING, TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978)).

After *Johnson*, however, sentencers apparently are not constitutionally required to consider all of these aspects of youth as mitigating circumstances in capital cases.

³²¹ See generally *Johnson*, 509 U.S. 350 (1993).

³²² For example, in *Franklin v. Lynaugh*, 487 U.S. 164, 172-73 (1988), the Court implied that a capital defendant does not have a constitutional right to an instruction telling the jury to consider as mitigating evidence any "residual doubt" it had about the defendant's guilt. The Court reasoned that "[s]uch lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or a 'circumstance of the offense.'" *Id.* at 174. The Court concluded, however, that even if the petitioner in that case had a constitutional right to have the jury consider "residual doubts," the rejection of the petitioner's proffered jury instructions did not impair that right. See *id.* at 175.

cided *Buchanan v. Angelone*,³²³ holding that the Eighth Amendment does not require the trial court “to instruct the jury on its obligation and authority to consider mitigating evidence, and on particular mitigating factors deemed relevant by the State.”³²⁴ Thus, arguably, under *Johnson* and *Buchanan*, the Court today permits states to put limitations on the consideration of mitigating evidence while at the same time it does not require states to give clear instructions to jurors regarding their responsibility to consider mitigating evidence.

B. *Broad Death Penalty Statutes*

Another way that the death penalty has moved closer to a mandatory scheme is through broad statutes that make it more likely that all murderers will be sentenced to death. States have created death penalty statutes that are broad in three ways. First, the statutes contain specific aggravating factors that are vague and overbroad.³²⁵ Second, many statutes permit arbitrary factors that make it more likely that the death penalty will be imposed.³²⁶ Third, most death penalty statutes include a long list of aggravating factors that include such a broad range of circumstances that they cover almost every first-degree murder case.³²⁷ These trends are discussed below.

1. *Broad Individual Aggravating Circumstances Cover a Broad Range of Murders*

As discussed in the previous section on arbitrariness,³²⁸ vague aggravating circumstances permit a sentencer to consider arbitrary factors. Many of these aggravating circumstances, however, are so broad that they can apply to almost any situation. While one aggravating circumstance by itself may not necessarily create a mandatory death penalty scheme, a statute containing several broad aggravating circumstances makes a broad sentencing statute even broader. For example, as discussed above, the “heinous, atrocious, or cruel” aggravating factor is used to cover a broad set of circumstances

³²³ 118 S. Ct. 757 (1998).

³²⁴ *Id.* at 761. The Court reasoned that by instructing the jury to consider “all the evidence,” the instruction was adequate to allow jurors to consider mitigating evidence. *See id.* at 762. However, reviewing the context of the entire jury instruction, the jury instruction could be read by a reasonable juror to mean that the jury is only to consider “all the evidence” relating to the aggravating circumstance. *See id.* 763-64 (Breyer, J., dissenting).

³²⁵ *See* discussion *infra* Part III.B.1.

³²⁶ *See* discussion *infra* Part III.B.2.

³²⁷ *See* discussion *infra* Part III.B.3.

³²⁸ *See* discussion *supra* Part II.B.

and applies to a very large number of murders.³²⁹ The “future danger” aggravating circumstance—either as a statutory or nonstatutory factor—also may be interpreted broadly by the sentencing body.³³⁰ Arguably, almost anyone just found guilty of murder is a future danger.

Another aggravating circumstance that has been applied broadly is the pecuniary gain aggravating circumstance. Although this aggravating factor applies to murder-for-hire situations,³³¹ it also applies in situations where part of the motive for the murder was to take anything of value, as in the typical robbery-murder situation.³³² The pecuniary gain aggravating circumstance covers such a broad range of activity that it substantially increases the class of defendants eligible for the death penalty.

Individually, many of these factors apply to a large percentage of murders. When combined, it is difficult to imagine a murder that would not satisfy one or more of the factors.

2. Nonstatutory Aggravating Factors and Victim Impact Evidence Make It More Likely That Death Sentences Will Be Imposed

The list of statutory aggravating factors in some states is expanded further by the admission into evidence of nonstatutory aggravating factors and victim impact information. As discussed above, although nonstatutory aggravating factors do not play a role in determining eligibility for the death penalty, once a statutory aggravating factor is found, the nonstatutory factors are considered in the decision to impose the death penalty. States that permit the use of a broad range of nonstatutory aggravating circumstances and victim impact evidence, added at the discretion of the prosecutor and the court, thus increase the number of cases in which the sentencer is likely to impose the death penalty.³³³

³²⁹ See discussion *supra* Part II.B.1.

³³⁰ See discussion *supra* Part II.B.2..

³³¹ See, e.g., *Harris v. Alabama*, 513 U.S. 504, 507 (1995) (upholding the trial judge’s reliance upon the pecuniary gain aggravating factor to override the jury’s recommendation of life where the defendant offered her lover a share of death benefits to have her husband killed).

³³² See, e.g., *State v. Dickens*, 926 P.2d 468, 491 (Ariz. 1996) (finding the defendant death eligible in a robbery-murder conviction based on the pecuniary gain aggravating factor).

³³³ See discussion *supra* Parts II.C-D. Also, jury instructions that list nonstatutory aggravating circumstances but not nonstatutory mitigating circumstances further tilt the balancing toward the imposition of more death sentences by emphasizing nonstatutory aggravating circumstances over mitigating circumstances. See *State v. Wacaser*, 794 S.W.2d 190, 195 (Mo. 1990) (stating that a trial court “should not list any nonstatutory mitigating circumstances in the instructions, because the inclusion of some might lead the jury to believe that it may not consider others”).

3. *Capital Sentencing Statutes Contain a Broad Range of Aggravating Circumstances That Cover a Broad Range of Murders*

The trend in various states is to add aggravating factors to already long lists of factors. In recent years, several states have expanded the coverage of their death penalty statutes,³³⁴ and politicians have attempted to boost their political standing by calling for further expansion.³³⁵ The United States

³³⁴ See, e.g., *Rate of Executions Escalating Sharply/Congress, States Limiting Appeals*, HOUS. CHRON., Dec. 5, 1996, at 8.

Congress and more than a dozen state legislatures in recent months have limited legal appeals for those under sentences of death, or have added "aggravating factors" allowing more convicted felons to be executed Tracy Snell, a Justice Department statistician, said Delaware, Illinois, Connecticut, New Jersey and Nevada are among states last year that expanded the crimes or special circumstances of a crime that could lead to capital punishment.

Id.

Another recent article reported:

In 1994, Congress expanded the federal death penalty to include 60 additional crimes, and since then two more states—Kansas and New York—have drafted death penalty statutes. In Virginia last year, legislators added multiple murders to the state's list of crimes punishable by death. This year, they added murders by drug kingpins and murders of pregnant women.

Laura LaFay, *Virginia Ignores Outcry: Death Penalty Cases Prompt International Intervention*, ROANOKE TIMES & WORLD NEWS (Va.), July 6, 1997, at C1; see also James A. Gillaspay, *Newman Offers Bill to Justify High Bail: County Prosecutor Seeks to Keep Violent Defendants Jailed While They Are Awaiting Trial*, INDIANAPOLIS STAR, Nov. 26, 1995, at C01 (reporting that the Indiana prosecutor's office backed a bill expanding the death penalty statute to allow victim impact testimony in capital cases); Frank Green & Jeff E. Schapiro, *Execution Protesters Speak Out But Senate Passes Measure to Expand Death Statute*, RICHMOND TIMES-DISPATCH (Va.), Jan. 30, 1996, at B1 (reporting that the Virginia Senate approved the "first of several measures creating additional capital crimes" allowing prosecutors to seek the death penalty against guardians of children who murder and abduct their wards); John Marelius, *Wilson Comes Down Hard on Crime—Again Signs Death Penalty Bill in Hope of Bringing His Campaign to Life*, SAN DIEGO UNION-TRIB., Sept. 28, 1995, at A3 (reporting that California Governor Pete Wilson signed two bills expanding the coverage of the death penalty statute, one regarding drive-by murders and another regarding murders committed during carjackings and retaliatory killings of jurors).

³³⁵ See, e.g., *States News Briefs: Kansas*, STATES NEWS SERVICE, Feb. 6, 1997, available in LEXIS, News Library, Wires File (reporting that the Kansas Attorney General said she supported expanding the coverage of the Kansas death penalty statute to include virtually all types of premeditated first-degree murder); John DiStaso, *Frank, Kathie Lee Gifford Aiding Swett's War Chest*, UNION LEADER (Manchester, N.H.), Oct. 17, 1996, at A1 (reporting that New Hampshire governor candidate Jeanne Shaheen held a news conference to proclaim that she would be tough on crime and would expand the coverage of the New Hampshire death penalty statute); Marelius, *supra* note

Department of Justice reported that in 1995, in addition to New York's enactment of a capital punishment statute, ten states expanded the coverage of their death penalty statutes by adding aggravating circumstances, expanding existing aggravating circumstances, adding to the definition of capital murder, or allowing victim impact evidence.³³⁶ In 1996, six states added new aggravating circumstances, expanded existing aggravating circumstances, or added to the definition of capital murder.³³⁷ Conversely, legislatures have not deleted unclear and vague aggravating circumstances.

While this expansion of aggravating factors has occurred, legislatures have not expanded the number of statutory mitigating factors. For example, despite an increased understanding of how abuse as a child can affect a capital defendant's psychological development, legislators "have declined to codify a significant childhood history of abuse (sexual, emotional, or physical) as a statutory mitigating factor."³³⁸ Although states still must allow a sentencer to consider nonstatutory mitigating factors, there is a potential discrepancy in the weight that a sentencer may give to nonstatutory factors

334, at A3 (reporting that in signing a bill to expand the death penalty in California, "Gov[ernor] Pete Wilson returned to a tried-and-true formula this week to try to breathe some life into a gasping presidential campaign: the gas chamber strategy").

³³⁶ See Tracy L. Snell, *Capital Punishment 1995*, BUREAU OF JUST. STAT. BULL., Dec. 1996, at 2-4. In 1995, death penalty statutes were expanded in Arkansas, Delaware, Illinois, Montana, Nevada, New Jersey, New York, Oregon, Pennsylvania, South Dakota, and Tennessee. See *id.* A recent study revealed that the 1990 state legislative sessions created over 185 death-penalty-related bills in 43 states, and that "most bills have favored the expansion, expedition or reinstatement of capital punishment." Leigh Dingerson, *Reclaiming the Gavel: Making Sense Out of the Death Penalty Debate in State Legislatures*, 18 N.Y.U. REV. L. & SOC. CHANGE 873, 876 (1991).

³³⁷ See Tracy L. Snell, *Capital Punishment 1996*, BUREAU OF JUST. STAT. BULL., Dec. 1997, at 2-4. In 1996, death penalty statutes were expanded in Florida, Indiana, Pennsylvania, South Carolina, Tennessee, and Virginia. See *id.*

³³⁸ J. Vincent Aprile II, *Childhood Abuse: Statutory Mitigation in Death Cases?*, CRIM. JUST., Summer 1997, at 42. Perhaps the reason legislators have not made abuse a statutory mitigating factor is because they are hesitant to appear soft on crime. This result is unfortunate, given the clear relevance of a history of abuse to capital sentencing.

Childhood victimization, the research continues to reveal, places individuals at risk of future psychological problems. . . .

Obviously, physical abuse to a child can result in physical damage to the child's brain or nervous system, which can be detected by neurological examinations. But recent brain research reveals that cortisol, a steroid hormone released by the brain when physical or psychological trauma occurs, can in chronically high levels also inflict physical damage on a child's brain, resulting in a loss of neurons and fewer synapses. These physical changes are not simply speculated by theorists; brain scans reveal the marked physical differences between the brains of the abused and the nonabused.

Id.

as opposed to statutory factors.³³⁹ To ensure that proper weight is given to significant mitigating factors, legislatures could add to existing lists of statutory mitigating factors, as they do to lists of statutory aggravating factors. Legislatures, however, consistently fail to do so.

Many states have a large number of aggravating factors. Arizona has ten,³⁴⁰ South Carolina has eleven,³⁴¹ Nevada has twelve,³⁴² Illinois has fifteen,³⁴³ and Pennsylvania has seventeen aggravating circumstances.³⁴⁴ In California, if a capital jury finds one or more of twenty-one statutory special circumstances,³⁴⁵ the case proceeds to the penalty phase and the jury then is instructed to consider eleven other factors in deciding whether to impose death.³⁴⁶ The range of aggravating factors for capital murder used in the United States can be seen by the following compiled list of aggravating factors that make a defendant eligible for the death penalty.³⁴⁷

³³⁹ See generally *id.*

³⁴⁰ See ARIZ. REV. STAT. ANN. § 13-703(F) (West Supp. 1997).

³⁴¹ See S.C. CODE ANN. § 16-3-20(c) (Law Co-op. Supp. 1996).

³⁴² See NEV. REV. STAT. ANN. § 200.033 (Michie 1997).

³⁴³ See 720 ILL. COMP. STAT. ANN. 5/9-1(b) (West Supp. 1997).

³⁴⁴ See 42 PA. CONS. STAT. ANN. § 9711(d) (West Supp. 1997).

³⁴⁵ See CAL. PENAL CODE § 190.2(a) (Deering Supp. 1997).

³⁴⁶ See *id.* § 190.3 (Deering Supp. 1997). These factors are broad, including “[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.” *Id.* § 190.3(k) (Deering Supp. 1997).

³⁴⁷ Although not all states have enacted a strict list of aggravating circumstances, this Article has attempted to incorporate into its compiled list the circumstances that serve the purpose of aggravating factors. For example, New York performs the constitutional narrowing at the conviction stage. Thus, its “aggravating factors” are listed as part of the definition of first-degree murder. See N.Y. PENAL LAW § 125.27 (McKinney Supp. 1997) (defining murder in the first degree); N.Y. CRIM. PROC. LAW § 400.27(7) (McKinney Supp. 1997) (listing two additional aggravating factors—not listed here because they do not relate to death eligibility—that also may be considered during the sentencing of a person convicted of murder in the first degree). Also, some states, such as Oregon and Texas, submit specific questions to the jury instead of a list of aggravating factors. See OR. REV. STAT. § 163.150(b) (Supp. 1996); TEX. CRIM. P. CODE ANN. § 37.071(b) (West Supp. 1997).

Note that some states may combine some of these listed factors into one factor or divide one of these factors in two. This Article has attempted to categorize the factors to avoid repetition, though one could categorize some of these factors differently than was done here. This list focuses on aggravating factors for capital murder, although some jurisdictions have arguably unconstitutional statutes that make some nonhomicide offenders eligible for the death penalty. See *infra* notes 396-97 and accompanying text. For example, the federal government’s list of death penalty aggravating factors for drug offenses, espionage, or treason are not included because they diverge from the scope of the ones listed for murder. See 18 U.S.C. § 3592(b), (d) (1994). The aggravating factors used by the military also are not listed here. See RULES FOR COURTS-MARTIAL 1004(c) (listing 11 categories of aggravating factors); see also *Loving v. United States*, 116 S.

a. *Facts Surrounding the Murder*

(1) The murder was especially heinous, atrocious, cruel, or depraved (or involved torture).³⁴⁸

Ct. 1737 (1996) (holding that it is constitutional for Congress to delegate the role of defining aggravating circumstances to the President).

³⁴⁸ See 18 U.S.C. § 3592(c)(6) (West Supp. 1997) ("The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim."); ALA. CODE § 13A-5-49(8) (1994) ("The capital offense was especially heinous, atrocious or cruel compared to other capital offenses."); ARIZ. REV. STAT. ANN. § 13-703(F)(6) (West Supp. 1997) ("The defendant committed the offense in an especially heinous, cruel or depraved manner."); ARK. CODE ANN. § 5-4-604(8)(A) (Michie Supp. 1995) ("The capital murder was committed in an especially cruel or depraved manner."); CAL. PENAL CODE § 190.2(a)(14) (Deering Supp. 1997) ("The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity."); COLO. REV. STAT. ANN. § 16-11-802(5)(j) (West Supp. 1996) ("The defendant committed the offense in an especially heinous, cruel, or depraved manner."); CONN. GEN. STAT. ANN. § 53a-46a(i)(4) (West Supp. 1997) ("The defendant committed the offense in an especially heinous, cruel or depraved manner."); DEL. CODE ANN. tit. 11, § 4209(e)(1)(I) (1995) ("The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering the victim."); FLA. STAT. ANN. § 921.141(5)(h) (West Supp. 1997) ("The capital felony was especially heinous, atrocious, or cruel."); GA. CODE ANN. § 17-10-30(b)(7) (1997) ("The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."); IDAHO CODE § 19-2515(h)(5) (1997) ("The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."); *id.* § 19-2515(h)(6) ("By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life."); 720 ILL. COMP. STAT. ANN. 5/9-1(14) (West Supp. 1997) ("[T]he murder was intentional and involved the infliction of torture."); IND. CODE ANN. § 35-50-2-9(b)(11) (Michie Supp. 1997) ("The defendant burned, mutilated, or tortured the victim while the victim was alive."); KAN. STAT. ANN. § 21-4625(6) (1995) ("The defendant committed the crime in an especially heinous, atrocious or cruel manner."); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(7) (West 1997) ("The offense was committed in an especially heinous, atrocious or cruel manner."); MISS. CODE ANN. § 99-19-101(5)(h) (1994) ("The capital offense was especially heinous, atrocious, or cruel."); MO. ANN. STAT. § 565.032.2(7) (West Supp. 1997) ("The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."); MONT. CODE ANN. § 46-18-303(3) (1997) ("The offense was deliberate homicide and was committed by means of torture."); NEB. REV. STAT. ANN. § 29-2523(1)(d) (Michie 1995) ("The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."); NEV. REV. STAT. ANN. § 200.033(8) (Michie 1995) ("The murder involved torture or the mutilation of the victim."); N.H. REV. STAT. ANN. § 630:5(VII)(h) (1996) ("The defendant committed the offense in an especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse to the victim."); N.J. STAT. ANN. § 2C:11-3(4)(c) (West Supp. 1997) ("The murder was

(2) The defendant dismembered or mutilated the victim after death.³⁴⁹

(3) The capital offense was committed during the commission of, attempt of, or escape from a specified felony (such as robbery, kidnapping, rape, sodomy, arson, oral copulation, train wrecking, carjacking, criminal gang activity, drug dealing, or aircraft piracy).³⁵⁰

outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim.”); N.Y. PENAL LAW § 125.27(1)(a)(x) (McKinney Supp. 1997) (“[T]he defendant acted in an especially cruel and wanton manner pursuant to a course of conduct intended to inflict and inflicting torture upon the victim prior to the victim’s death”); N.C. GEN. STAT. § 15A-2000(e)(9) (1988) (“The capital felony was especially heinous, atrocious, or cruel.”); OKLA. STAT. ANN. tit. 21, § 701.12(4) (West 1983) (“The murder was especially heinous, atrocious, or cruel.”); 42 PA. CONS. STAT. ANN. § 9711(d)(8) (West Supp. 1997) (“The offense was committed by means of torture.”); S.D. CODIFIED LAWS § 23A-27A-1(6) (Michie Supp. 1997) (“The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age.”); TENN. CODE ANN. § 39-13-204(i)(5) (1997) (“The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death”); UTAH CODE ANN. § 76-5-202(1)(q) (Supp. 1997) (“[T]he homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death.”); VA. CODE ANN. § 19.2-264.2(1) (Michie 1995) (“[H]is conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.”); WYO. STAT. ANN. § 6-2-102(h)(vii) (Michie 1997) (“The murder was especially atrocious or cruel, being unnecessarily torturous to the victim.”); *see also* IND. CODE ANN. § 35-50-2-9(10) (Michie Supp. 1997) (“The defendant dismembered the victim.”).

³⁴⁹ IND. CODE ANN. § 35-50-2-9(10) (Michie Supp. 1997) (“The defendant dismembered the victim.”); TENN. CODE ANN. § 39-13-204(i)(13) (1997) (“The defendant knowingly mutilated the body of the victim after death.”). This aggravating circumstance is similar to the “heinous, atrocious, cruel, or depraved” category of aggravating factors because in most of those states, if not all, dismembering the victim would constitute depravity.

³⁵⁰ *See* 18 U.S.C. § 3592 (c)(1) (1994) (listing as an aggravating factor that death occurred “during the commission or attempted commission of, or during the immediate flight from the commission of,” several enumerated crimes); ALA. CODE § 13A-5-49(4) (1994) (“The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping.”); CAL. PENAL CODE § 190.2(a)(17) (Deering Supp. 1997):

The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: (A) Robbery (B) Kidnapping (C) Rape (D) Sodomy (E) The performance of a lewd or lascivious act upon the person of a child under the age of 14 (F) Oral copulation (G) Burglary in the first or second degree

(H) Arson (I) Train wrecking (J) Mayhem (K) Rape by instrument (L) Carjacking

COLO. REV. STAT. ANN. § 16-11-802(5)(g) (West Supp. 1996) ("The defendant committed or attempted to commit a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, the defendant intentionally caused the death of a person other than one of the participants."); CONN. GEN. STAT. ANN. § 53a-46a(i)(1) (West Supp. 1997) ("The defendant committed the offense during the commission or attempted commission of, or during the immediate flight from the commission or attempted commission of, a felony and he had previously been convicted of the same felony."); DEL. CODE ANN. tit. 11, § 4209(e)(1)(j) (1995) ("The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary."); FLA. STAT. ANN. § 921.141(5)(d) (West Supp. 1997):

The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb;

GA. CODE ANN. § 17-10-30(b)(2) (1997) ("The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree."); IDAHO CODE § 19-2515(h)(7) (1997) ("The murder was committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem and the defendant killed, intended a killing, or acted with reckless indifference to human life."); 720 ILL. COMP. STAT. ANN. 5/9-1(b)(6) (West Supp. 1997) (describing a very long aggravating circumstance that requires that the defendant killed the victim—or that the defendant is legally accountable for the victim's death—and that the murder was committed during the course of one of a long list of felonies); IND. CODE ANN. § 35-50-2-9(b)(1) (Michie Supp. 1997) ("The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following: (A) Arson. (B) Burglary. (C) Child molesting. (D) Criminal deviate conduct. (E) Kidnapping. (F) Rape. (G) Robbery. (H) Carjacking. (I) Criminal gang activity. (J) Dealing in cocaine or a narcotic drug."); *id.* § 35-50-2-9(b)(13) ("The victim was a victim of any of the following offenses for which the defendant was convicted: (A) Battery (B) Kidnapping (C) Criminal confinement (D) A sex crime"); KY. REV. STAT. ANN. § 532.025(2)(a)(2) (Banks-Baldwin 1990) ("The offense of murder or kidnapping was committed while the offender was engaged in the commission of arson in the first degree, robbery in the first degree, burglary in the first degree, rape in the first degree, or sodomy in the first degree."); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1) (West 1997) ("The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, second degree kidnapping, aggravated burglary, aggravated arson, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, or simple robbery."); MD. ANN. CODE art. 27, § 413(d)(10) (1996) ("The defendant committed the murder while com-

mitting or attempting to commit a carjacking, armed carjacking, robbery, arson in the first degree, rape or sexual offense in the first degree.”); MISS. CODE ANN. § 99-19-101(5)(d) (1994):

The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child . . . or the unlawful use or detonation of a bomb or explosive device;

MO. ANN. STAT. § 565.032.2(11) (West Supp. 1997) (“The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense”); *id.* § 565.032.2(15) (“The murder was committed for the purpose of concealing or attempting to conceal any felony offense”); MONT. CODE ANN. § 46-18-303(7) (1997) (“The offense was aggravated kidnapping that resulted in the death of the victim or the death by direct action of the defendant of a person who rescued or attempted to rescue the victim.”); NEV. REV. STAT. ANN. § 200.033(4) (Michie 1997):

The murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit, any robbery, sexual assault, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, and the person charged: (a) Killed or attempted to kill the person murdered; or (b) Knew or had reason to know that life would be taken or lethal force used;

N.J. STAT. ANN. § 2C:11-3(4)(g) (West Supp. 1997) (“The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping.”); N.M. STAT. ANN. § 31-20A-5(B) (Michie 1994) (“[T]he murder was committed with intent to kill in the commission of or attempt to commit kidnapping, criminal sexual contact of a minor or criminal sexual penetration.”); N.Y. PENAL LAW § 125.27(1)(a)(vii) (McKinney Supp. 1997):

[T]he victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of robbery, burglary in the first degree or second degree, kidnapping in the first degree, arson in the first degree or second degree, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, aggravated sexual abuse in the first degree or escape in the first degree, or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime or in the course of and furtherance of immediate flight after attempting to commit the crime of murder in the second degree . . . ;

N.C. GEN. STAT. § 15A-2000(e)(5) (1988):

The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb;

OHIO REV. CODE ANN. § 2929.04(A)(7) (Banks-Baldwin 1997):

The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design;

42 PA. CONS. STAT. ANN. § 9711(d)(6) (West Supp. 1997) ("The defendant committed a killing while in the perpetration of a felony."); *id.* § 9711(d)(13) ("The defendant committed the killing or was an accomplice in the killing . . . while in the perpetration of a felony under the provisions of . . . The Controlled Substance, Drug, Device and Cosmetic Act . . ."); S.C. CODE ANN. § 16-3-20(C)(a)(1) (Law Co-op. Supp. 1996):

The murder was committed while in the commission of the following crimes or acts: (a) criminal sexual conduct in any degree; (b) kidnapping; (c) burglary in any degree; (d) robbery while armed with a deadly weapon; (e) larceny with use of a deadly weapon; (f) killing by poison; (g) drug trafficking . . . ; (h) physical torture; or (i) dismemberment of a person;

S.D. CODIFIED LAWS § 23A-27A-1(10) (Michie Supp. 1997) ("The offense was committed in the course of manufacturing, distributing, or dispensing substances listed in Schedules I and II."); TENN. CODE ANN. § 39-13-204(i)(7) (1997):

The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;

UTAH CODE ANN. § 76-5-202(1)(d) (Supp. 1997):

[T]he homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, aggravated robbery, robbery, rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse of a child, child abuse of a child under the age of 14 years, . . . or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnaping, kidnaping, or child kidnaping;

WASH. REV. CODE ANN. § 10.95.020(11) (West Supp. 1997):

The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes: (a) Robbery in the first or second degree; (b) Rape in the first or second degree; (c) Burglary in the first or second degree or residential burglary; (d) Kidnapping in the first degree; or (e) Arson in the first degree;

WYO. STAT. ANN. § 6-2-102(h)(iv) (Michie 1997) ("The murder was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb."); *id.* § 6-2-102(h)(xii) ("The defendant killed another human being purposely and with premeditated malice and while engaged in, or as an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual assault, arson, burglary or kidnapping."); *see also* TEX. PENAL CODE ANN. § 19.03(a)(2) (West 1994) (including as part of the definition of capital murder: "the

- (4) The murder was part of a course of conduct in which the defendant engaged.³⁵¹
- (5) The defendant committed "mass murder."³⁵²
- (6) The murder was committed incident to a hijacking.³⁵³
- (7) The murder was committed from a motor vehicle or near a motor vehicle that transported the defendant.³⁵⁴
- (8) The murder was committed by intentionally discharging a firearm into an inhabited dwelling.³⁵⁵
- (9) The defendant knowingly created a grave risk of death for one or more persons in addition to the victim of the offense.³⁵⁶

person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, or obstruction or retaliation").

³⁵¹ See N.C. GEN. STAT. § 15A-2000(e)(11) (1988) ("The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.").

³⁵² See TENN. CODE ANN. § 39-13-204(i)(12) (1997) ("The defendant committed 'mass murder,' which is defined as the murder of three (3) or more persons whether committed during a single criminal episode or at different times within a forty-eight month period.").

³⁵³ See 720 ILL. COMP. STAT. ANN. 5/9-1(b)(4) (West Supp. 1997) ("[T]he murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance."); MO. ANN. STAT. § 565.032.2(14) (West Supp. 1997) ("The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance."); 42 PA. CONS. STAT. ANN. § 9711(d)(4) (West Supp. 1997) ("The death of the victim occurred while defendant was engaged in the hijacking of an aircraft."); UTAH CODE ANN. § 76-5-202(1)(m) (Supp. 1997):

[T]he homicide was committed during the act of unlawfully assuming control of any aircraft, train, or other public conveyance by use of threats or force with intent to obtain any valuable consideration for the release of the public conveyance or any passenger, crew member, or any other person aboard, or to direct the route or movement of the public conveyance or otherwise exert control over the public conveyance.

³⁵⁴ See CAL. PENAL CODE § 190.2(a)(21) (Deering Supp. 1997) ("The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death."); IND. CODE ANN. § 35-50-2-9(b)(15) (Michie Supp. 1997) ("The defendant committed the murder by intentionally discharging a firearm . . . (B) from a vehicle."); WASH. REV. CODE ANN. § 10.95.020(7) (West Supp. 1997):

The murder was committed during the course of or as a result of a shooting where the discharge of the firearm . . . is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

³⁵⁵ See IND. CODE ANN. § 35-50-2-9(b)(15) (Michie Supp. 1997) ("The defendant committed the murder by intentionally discharging a firearm . . . (A) into an inhabited dwelling . . .").

³⁵⁶ See 18 U.S.C. § 3592(c)(5) (1994) ("The defendant, in the commission of the

offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense.”); ALA. CODE § 13A-5-49(3) (1994) (“The defendant knowingly created a great risk of death to many persons.”); ARIZ. REV. STAT. ANN. § 13-703(F)(3) (West Supp. 1997) (“In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.”); ARK. CODE ANN. § 5-4-604(4) (Michie Supp. 1995) (“The person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim or caused the death of more than one (1) person in the same criminal episode.”); COLO. REV. STAT. ANN. § 16-11-802(5)(i) (West Supp. 1996) (“In the commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.”); CONN. GEN. STAT. ANN. § 53a-46a(i)(3) (West Supp. 1997) (“[T]he defendant committed the offense and in such commission knowingly created a grave risk of death to another person in addition to the victim of the offense.”); FLA. STAT. ANN. § 921.141(5)(c) (West Supp. 1997) (“The defendant knowingly created a great risk of death to many persons.”); GA. CODE ANN. § 17-10-30(b)(3) (1997) (“The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.”); IDAHO CODE § 19-2515(h)(3) (1997) (“The defendant knowingly created a great risk of death to many persons.”); KAN. STAT. ANN. § 21-4625(2) (1995) (“The defendant knowingly or purposely killed or created a great risk of death to more than one person.”); KY. REV. STAT. ANN. § 532.025(2)(a)(3) (Banks-Baldwin 1990):

The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one (1) person in a public place by means of a destructive device, weapon, or other device which would normally be hazardous to the lives of more than one (1) person;

LA. CODE CRIM. PROC. ANN. art. 905.4(A)(4) (West 1997) (“The offender knowingly created a risk of death or great bodily harm to more than one person.”); MISS. CODE ANN. § 99-19-101(5)(c) (1994) (“The defendant knowingly created a great risk of death to many persons.”); MO. ANN. STAT. § 565.032.2(3) (West Supp. 1997) (“The offender by his act of murder in the first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.”); MONT. CODE ANN. § 46-18-303(5) (1997) (“The offense was deliberate homicide and was committed as a part of a scheme or operation that, if completed, would result in the death of more than one person.”); NEB. REV. STAT. ANN. § 29-2523(1)(f) (Michie 1995) (“The offender knowingly created a great risk of death to at least several persons.”); NEV. REV. STAT. ANN. § 200.033(3) (Michie 1997) (“The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.”); N.H. REV. STAT. ANN. § 630:5(VII)(e) (1996) (“In the commission of the offense of capital murder, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.”); N.J. STAT. ANN. § 2C:11-3(4)(b) (West Supp. 1997) (“In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim.”); N.C. GEN. STAT. § 15A-2000(e)(10) (1988) (“The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be haz-

(10) The defendant committed or attempted to commit more than one murder at the same time.³⁵⁷

ardous to the lives of more than one person.”); OHIO REV. CODE ANN. § 2929.04(A)(5) (Banks-Baldwin 1997) (“[T]he offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.”); OKLA. STAT. ANN. tit. 21, § 701.12(2) (West 1983) (“The defendant knowingly created a great risk of death to more than one person.”); 42 PA. CONS. STAT. ANN. § 9711(d)(7) (West Supp. 1997) (“In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.”); S.C. CODE ANN. § 16-3-20(C)(a)(3) (Law Co-op. Supp. 1996) (“The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.”); S.D. CODIFIED LAWS § 23A-27A-1(2) (Michie Supp. 1997) (“The defendant by the defendant’s act knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.”); TENN. CODE ANN. § 39-13-204(i)(3) (1997) (“The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder.”); UTAH CODE ANN. § 76-5-202(1)(c) (Supp. 1997) (“[T]he actor knowingly created a great risk of death to a person other than the victim and the actor.”); WYO. STAT. ANN. § 6-2-102(h)(iii) (Michie 1997) (“The defendant knowingly created a great risk of death to two (2) or more persons.”).

³⁵⁷ See 18 U.S.C. § 3592(c)(16) (1994) (“The defendant intentionally killed or attempted to kill more than one person in a single criminal episode.”); ARIZ. REV. STAT. ANN. § 13-703(F)(8) (West Supp. 1997) (“The defendant has been convicted of one or more other homicides . . . which were committed during the commission of the offense.”); CAL. PENAL CODE § 190.2(a)(3) (Deering Supp. 1997) (“The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree.”); DEL. CODE ANN. tit. 11, § 4209(e)(1)(k) (1995) (“The defendant’s course of conduct resulted in the deaths of 2 or more persons where the deaths are a probable consequence of the defendant’s conduct.”); IDAHO CODE § 19-2515(h)(2) (1997) (“At the time the murder was committed the defendant also committed another murder.”); 720 ILL. COMP. STAT. ANN. 5/9-1(b)(3) (West Supp. 1997):

The defendant has been convicted of murdering two or more individuals . . . regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate acts which the defendant knew would cause death or create a strong probability of death or great bodily harm to the murdered individual or another;

KY. REV. STAT. ANN. § 532.025(2)(a)(6) (Banks-Baldwin 1990) (“The offender’s act or acts of killing were intentional and resulted in multiple deaths.”); MD. ANN. CODE art. 27, § 413(d)(9) (1996) (“The defendant committed more than one offense of murder in the first degree arising out of the same incident.”); MO. ANN. STAT. § 565.032.2(2) (West Supp. 1997) (“The murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide.”); NEB. REV. STAT. ANN. § 29-2523(1)(e) (Michie 1995) (“At the time the murder was committed, the offender also committed another murder.”); NEV. REV. STAT. ANN. § 200.033(12) (Michie 1997) (“The defendant has, in the immediate pro-

- (11) The defendant committed the murder after substantial planning and premeditation.³⁵⁸
- (12) The defendant killed the victim while lying in wait.³⁵⁹
- (13) The defendant purposely killed the victim.³⁶⁰
- (14) The defendant committed the offense while engaged in a "[c]ontinuing

ceeding, been convicted of more than one offense of murder in the first or second degree"); N.Y. PENAL LAW § 125.27(1)(a)(viii) (McKinney Supp. 1997) ("[A]s part of the same criminal transaction, the defendant, with intent to cause serious physical injury to or the death of an additional person or persons, causes the death of an additional person or persons; provided, however, the victim is not a participant in the criminal transaction."); 42 PA. CONS. STAT. ANN. § 9711(d)(11) (West Supp. 1997) ("The defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue."); S.C. CODE ANN. § 16-3-20(C)(a)(9) (Law Co-op. Supp. 1996) ("Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct."); UTAH CODE ANN. § 76-5-202(1)(b) (Supp. 1997) ("The homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed, or during which the actor attempted to kill one or more persons in addition to the victim who was killed."); WASH. REV. CODE ANN. § 10.95.020(10) (West Supp. 1997) ("There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person."); *see also* TEX. PENAL CODE ANN. § 19.03(a)(7) (West 1994) (including as part of the definition of capital murder: "the person murders more than one person: (A) during the same criminal transaction; or (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct").

³⁵⁸ *See* 18 U.S.C. § 3592 (c)(9) (1994) ("The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism."); DEL. CODE ANN. tit. 11, § 4209(e)(1)(u) (Supp. 1996) ("The murder was premeditated and the result of substantial planning [as to the commission of the murder itself]."); FLA. STAT. ANN. § 921.141(5)(i) (West Supp. 1997) ("The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification."); N.H. REV. STAT. ANN. § 630.5 (VII)(f) (1996) ("The defendant committed the offense after substantial planning and premeditation.").

³⁵⁹ *See* CAL. PENAL CODE § 190.2(a)(15) (Deering 1997) ("The defendant intentionally killed the victim while lying in wait."); COLO. REV. STAT. § 16-11-802(5)(f) (Supp. 1996) ("The defendant committed the offense while lying in wait, from ambush"); IND. CODE ANN. § 35-50-2-9(b)(3) (Michie Supp. 1997) ("The defendant committed the murder by lying in wait."); MONT. CODE ANN. § 46-18-303(4) (1997) ("The offense was deliberate homicide and was committed by a person lying in wait or ambush.").

³⁶⁰ *See* N.H. REV. STAT. ANN. § 630.5(VII)(a) (1996):

The defendant: (1) purposely killed the victim; (2) purposely inflicted serious bodily injury which resulted in the death of the victim; (3) purposely engaged in conduct which: (A) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and (B) resulted in the death of the victim.

criminal enterprise involving drug sales to minors.”³⁶¹

(15) The murder was committed by means of a bomb, destructive device, explosive, or similar device.³⁶²

(16) The murder was committed by means of poison or a lethal substance.³⁶³

(17) The defendant committed the offense with an assault weapon.³⁶⁴

³⁶¹ 18 U.S.C. § 3592(c)(13) (1994).

³⁶² See ARK. CODE ANN. § 5-4-604(9) (Michie Supp. 1995):

The capital murder was committed by means of a destructive device, bomb, explosive, or similar device which the person planted, hid, or concealed in any place, area, dwelling, building, or structure, or mailed or delivered, or caused to be planted, hidden, concealed, mailed, or delivered, and the person knew that his act or acts would create a great risk of death to human life;

CAL. PENAL CODE § 190.2(a)(4) (Deering 1997):

The murder was committed by means of a destructive device, bomb, or explosive planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings;

id. § 190.2(a)(6):

The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings;

COLO. REV. STAT. § 16-11-802(5)(f) (Supp. 1996) (“The defendant committed the offense . . . by use of an explosive or incendiary device.”); IND. CODE ANN. § 35-50-2-9(b)(2) (Michie Supp. 1997) (“The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.”); N.J. STAT. ANN. § 2C:11-3(4)(j) (West Supp. 1997) (“The homicidal act that the defendant committed or procured . . . ” violated another statute regarding causing or risking widespread damage through the use of an explosion, flood, avalanche, or similar means listed.); TENN. CODE ANN. § 39-13-204(i)(7) (1997):

The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any . . . unlawful throwing, placing or discharging of a destructive device or bomb;

UTAH CODE ANN. § 76-5-202(1)(l) (Supp. 1997) (“[T]he homicide was committed by means of a destructive device, bomb, explosive, incendiary device, or similar device which was planted, hidden, or concealed in any place, area, dwelling, building, or structure, or was mailed or delivered.”).

³⁶³ See UTAH CODE ANN. § 76-5-202(1)(n) (Supp. 1997) (“[T]he homicide was committed by means of the administration of a poison or of any lethal substance or of any substance administered in a lethal amount, dosage, or quantity.”).

³⁶⁴ See CONN. GEN. STAT. § 53a-46a(i)(7) (1997) (“[T]he defendant committed the offense with an assault weapon . . . ”).

(18) The murder was committed while the defendant was engaged in "ritualistic acts."³⁶⁵

*b. Motivation for the Murder*³⁶⁶

(1) The murder was committed for pecuniary gain or pursuant to an agreement that the defendant would receive something of value.³⁶⁷

³⁶⁵ See LA. CODE CRIM. PROC. ANN. art. 905.4(A)(12) (West 1997) ("The offender was engaged in the activities prohibited by [a statute dealing with 'ritualistic acts'].").

³⁶⁶ This Article has divided the groups of aggravating factors into categories for organizational purposes and has tried to place them where they fit the best. Some factors, however, could be grouped into more than one category. For example, some of the "victim status" category aggravating factors also fall under the category of "motivation for murder." One such aggravating factor is the killing of an informant because that person is an informant.

³⁶⁷ Many jurisdictions use a variation of this aggravating factor, which generally includes defendants whose murders involved some type of robbery and defendants who murdered for hire. See 18 U.S.C. § 3592(c)(7), (8) (1994) ("The defendant committed the offense as consideration of the receipt, or in the expectation of the receipt, of anything of pecuniary value."); ALA. CODE § 13A-5-49(6) (1994) ("The capital offense was committed for pecuniary gain."); ARIZ. REV. STAT. ANN. § 13-703(F)(5) (West Supp. 1996) ("The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value."); ARK. CODE ANN. § 5-4-604(6) (Michie Supp. 1995) ("The capital murder was committed for pecuniary gain."); CAL. PENAL CODE § 190.2(a)(1) (Deering 1997) ("The murder was intentional and carried out for financial gain."); COLO. REV. STAT. § 16-11-802(5)(h) (Supp. 1996) ("The class 1 felony was committed for pecuniary gain."); DEL. CODE ANN. tit. 11, § 4209(e)(1)(h) (Supp. 1996) ("The defendant paid or was paid by another person or had agreed to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim."); *id.* § 4209(e)(1)(o) ("The murder was committed for pecuniary gain."); FLA. STAT. ANN. § 921.141(5)(f) (West Supp. 1997) ("The capital felony was committed for pecuniary gain."); GA. CODE ANN. § 17-10-30(b)(4) (1997) ("The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value."); IDAHO CODE § 19-2515(h)(4) (1997) ("The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration."); 720 ILL. COMP. STAT. 5/9-1(b)(5) (West Supp. 1997) ("[T]he defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder . . ."); KAN. STAT. ANN. § 21-4625(3) (1996) ("The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value."); KY. REV. STAT. ANN. § 532.025(2)(a)(4) (Michie 1996) ("The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value, or for other profit."); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(5) (West 1997) ("The offender offered or has been offered or has given or received anything of value for the commission of the offense."); MD. ANN. CODE art. 27, § 413(d)(6) (1996) ("The

(2) The defendant caused or directed another to commit murder, or the defendant procured the commission of the offense by payment, promise of payment, or anything of pecuniary value.³⁶⁸

defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.”); MISS. CODE ANN. § 99-19-101(5)(f) (Supp. 1997) (“The capital offense was committed for pecuniary gain.”); MO. ANN. STAT. § 565.032.2(4) (West Supp. 1997) (“The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another.”); NEB. REV. STAT. § 29-2523(1)(c) (1995) (“The murder was committed for hire, or for pecuniary gain”); NEV. REV. STAT. ANN. § 200.033(6) (Michie 1997) (“The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value.”); N.H. REV. STAT. ANN. § 630.5(VII)(i) (1996) (“The murder was committed for pecuniary gain.”); N.J. STAT. ANN. § 2C:11-3(4)(d) (West Supp. 1997) (“The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value.”); N.M. STAT. ANN. § 31-20A-5(F) (Michie Supp. 1997) (“[T]he capital felony was committed for hire.”); N.Y. PENAL LAW § 125.27(1)(a)(vi) (McKinney Supp. 1997):

[T]he defendant committed the killing . . . pursuant to an agreement with a person other than the intended victim to commit the same for the receipt, or in expectation of the receipt, of anything of pecuniary value from a party to the agreement or from a person other than the intended victim acting at the direction of a party to such agreement;

N.C. GEN. STAT. § 15A-2000(e)(6) (Supp. 1996) (“The capital felony was committed for pecuniary gain.”); OHIO REV. CODE ANN. § 2929.04(A)(2) (Banks-Baldwin 1997) (“The offense was committed for hire.”); OKLA. STAT. ANN. tit. 21, § 701.12(3) (West 1983) (“The person committed the murder for remuneration or the promise of remuneration”); 42 PA. CONS. STAT. ANN. § 9711(d)(2) (West Supp. 1997) (“The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.”); S.C. CODE ANN. § 16-3-20(C)(a)(4) (Law Co-op. Supp. 1996) (“The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.”); S.D. CODIFIED LAWS § 23A-27A-1(3) (Michie Supp. 1997) (“The defendant committed the offense for the benefit of the defendant or another, for the purpose of receiving money or any other thing of monetary value.”); TENN. CODE ANN. § 39-13-204(i)(4) (1997) (“The defendant committed the murder for remuneration or the promise of remuneration”); UTAH CODE ANN. § 76-5-202(1)(f) (Supp. 1997) (“The homicide was committed for pecuniary or other personal gain.”); *id.* § 76-5-202(1)(g) (“The defendant committed . . . the homicide pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide.”); WASH. REV. CODE ANN. § 10.95.020(4) (West Supp. 1997) (“The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder.”); WYO. STAT. ANN. § 6-2-102(h)(vi) (Michie 1997) (“The murder was committed for compensation, the collection of insurance benefits or other similar pecuniary gain.”); *see also* TEX. PENAL CODE ANN. § 19.03(a)(3) (West Supp. 1997) (including as part of the definition of capital murder: “the person commits the murder for remuneration or the promise of remuneration”).

³⁶⁸ This aggravating circumstance includes defendants who paid for the commission

of murder. *See* 18 U.S.C. § 3592(c)(7) (1994) ("The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value."); ARIZ. REV. STAT. ANN. § 13-703(F)(4) (West Supp. 1996) ("The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value."); COLO. REV. STAT. § 16-11-802(5)(e) (Supp. 1996) ("The defendant has been a party to an agreement to kill another person in furtherance of which a person has been intentionally killed."); CONN. GEN. STAT. § 53a-46a(i)(5) (1997) ("[T]he defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value."); DEL. CODE ANN. tit. 11, § 4209(e)(1)(h) (Supp. 1996) ("The defendant paid . . . another person or had agreed to pay . . . another person or had conspired to pay . . . another person for the killing of the victim."); *id.* § 4209(e)(1)(m) ("The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person."); GA. CODE ANN. § 17-10-30(b)(6) (1997) ("The offender caused or directed another to commit murder or committed murder as an agent or employee of another person."); IDAHO CODE § 19-2515(h)(4) (1997) ("[T]he defendant employed another to commit the murder for remuneration or the promise of remuneration."); 720 ILL. COMP. STAT. 5/9-1(b)(5) (West Supp. 1997) ("[T]he defendant . . . procured another to commit the murder for money or anything of value."); IND. CODE ANN. § 35-50-2-9(b)(5) (Michie Supp. 1997) ("The defendant committed the murder by hiring another person to kill."); KAN. STAT. ANN. § 21-4625(4) (1995) ("The defendant authorized or employed another person to commit the crime."); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(5) (West 1997) ("The offender offered . . . or has given . . . anything of value for the commission of the offense."); MD. ANN. CODE art. 27, § 413(d)(7) (1996) ("The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration."); MO. ANN. STAT. § 565.032.2(6) (West Supp. 1997) ("The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person."); NEB. REV. STAT. ANN. § 29-2523(1)(c) (Michie 1995) ("The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant."); NEV. REV. STAT. ANN. § 200.033.6 (Michie 1997) ("The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value."); N.J. STAT. ANN. § 2C:11-3(4)(e) (West Supp. 1997) ("The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value."); N.M. STAT. ANN. § 31-20A-5(F) (Michie Supp. 1997) ("[T]he capital felony was committed for hire"); N.Y. PENAL LAW § 125.27(1)(a)(vi) (McKinney Supp. 1997):

[T]he defendant . . . procured commission of the killing pursuant to an agreement with a person other than the intended victim to commit the same for the receipt, or in expectation of the receipt, of anything of pecuniary value from a party to the agreement or from a person other than the intended victim acting at the direction of a party to such agreement;

OHIO REV. CODE ANN. § 2929.04(A)(2) (Banks-Baldwin 1997) ("The offense was committed for hire."); OKLA. STAT. ANN. tit. 21, § 701.12(3) (West 1983) ("The person . . . employed another to commit the murder for remuneration or the promise of remuneration."); 42 PA. CONS. STAT. ANN. § 9711(d)(2) (West Supp. 1997) ("The defendant paid . . . another person or had contracted to pay . . . another person or had conspired to pay . . . another person for the killing of the victim."); S.C. CODE ANN.

(3) The murder was committed to avoid or prevent arrest, to effect an escape, or to conceal the commission of a crime.³⁶⁹

§ 16-3-20(C)(a)(6) (Law Co-op. Supp. 1996) ("The offender caused or directed another to commit murder or committed murder as an agent or employee of another person."); S.D. CODIFIED LAWS § 23A-27A-1(5) (Michie Supp. 1997) ("The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person."); TENN. CODE ANN. § 39-13-204(i)(4) (1997) ("The defendant . . . employed another to commit the murder for remuneration or the promise of remuneration."); UTAH CODE ANN. § 76-5-202(1)(g) (Supp. 1997) ("the defendant committed, or engaged or employed another person to commit the homicide pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide."); WASH. REV. CODE ANN. § 10.95.020(5) (West Supp. 1997) ("The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder."); *see also* TEX. PENAL CODE ANN. § 19.03(a)(3) (West Supp. 1997) (including as part of the definition of capital murder: "the person . . . employs another to commit the murder for remuneration or the promise of remuneration").

³⁶⁹ *See* ALA. CODE § 13A-5-49(5) (1994) ("The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."); ARIZ. REV. STAT. ANN. § 13-703(F)(7) (West Supp. 1996) ("The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail."); ARK. CODE ANN. § 5-4-604(5) (Michie Supp. 1995) ("The capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody."); CAL. PENAL CODE § 190.2(a)(5) (Deering 1997) ("The murder was committed for the purpose of avoiding or preventing a lawful arrest or perfecting or attempting to perfect an escape from lawful custody."); COLO. REV. STAT. § 16-11-802(5)(k) (Supp. 1996) ("The class 1 felony was committed for the purpose of avoiding or preventing a lawful arrest or prosecution or effecting an escape from custody."); DEL. CODE ANN. tit. 11, § 4209(e)(1)(b) (Supp. 1996) ("The murder was committed for the purpose of avoiding or preventing an arrest or for the purpose of effecting an escape from custody."); FLA. STAT. ANN. § 921.141(5)(e) (West Supp. 1997) ("The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."); GA. CODE ANN. § 17-10-30(b)(10) (1997) ("The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."); KAN. STAT. ANN. § 21-4625(5) (1995) ("The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution."); MD. ANN. CODE art. 27, § 413(d)(3) (1996) ("The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer."); MISS. CODE ANN. § 99-19-101(5)(e) (Supp. 1997) ("The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."); MO. ANN. STAT. § 565.032.2(10) (West Supp. 1997) ("The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."); NEB. REV. STAT. ANN. § 29-2523(1)(b) (Michie 1995) ("The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a

(4) The capital offense was committed to interfere with the lawful exercise of any government function or the enforcement of the laws.³⁷⁰

crime.”); NEV. REV. STAT. ANN. § 200.033.5 (Michie 1997) (“The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.”); N.H. REV. STAT. ANN. § 630.5(VII)(j) (1996) (“The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.”); N.J. STAT. ANN. § 2C:11-3(4)(f) (West Supp. 1997) (“The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another.”); N.M. STAT. ANN. § 31-20A-5(c) (Michie Supp. 1997) (“[T]he murder was committed with the intent to kill by the defendant while attempting to escape from a penal institution of New Mexico.”); N.C. GEN. STAT. § 15A-2000(e)(4) (Supp. 1996) (“The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.”); OKLA. STAT. ANN. tit. 21, § 701.12(5) (West 1983) (“The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.”); S.D. CODIFIED LAWS § 23A-27A-1(8) (Michie Supp. 1997) (“The offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement.”); *id.* § 23A-27A-1(9) (“The offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of the defendant or another.”); TENN. CODE ANN. § 39-13-204(i)(8) (1997) (“The murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful confinement or during the defendant’s escape from lawful custody or from a place of lawful confinement.”); *id.* § 39-13-204(i)(6) (“The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.”); UTAH CODE ANN. § 76-5-202(1)(e) (Supp. 1997) (“[T]he homicide was committed for the purpose of avoiding or preventing an arrest of the defendant or another by a peace officer acting under color of legal authority or for the purpose of effecting the defendant’s or another’s escape from lawful custody.”); WYO. STAT. ANN. § 6-2-102(h)(v) (Michie 1997) (“The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.”); *see also* TEX. PENAL CODE ANN. § 19.03(a)(4) (West Supp. 1997) (including as part of the definition of capital murder: “the person commits the murder while escaping or attempting to escape from a penal institution”).

³⁷⁰ *See* ALA. CODE § 13A-5-49(7) (1994) (“The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.”); ARK. CODE ANN. § 5-4-604(7) (Michie Supp. 1995) (“The capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function.”); FLA. STAT. ANN. § 921.141(5)(g) (West Supp. 1997) (“The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.”); MISS. CODE ANN. § 99-19-101(5)(g) (Supp. 1997) (“The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.”); MO. ANN. STAT. § 565.032.2(16) (West Supp. 1997) (“The murder was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense”); NEB. REV. STAT. ANN. § 29-2523(1)(h) (Michie 1995) (“The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.”); N.C. GEN. STAT. § 15A-

(5) The defendant committed the murder as part of a gang activity or to obtain or maintain membership or to advance his or her position in an organization or group.³⁷¹

(6) The defendant had no apparent motive.³⁷²

c. Defendant's Status

(1) The defendant is a future danger.³⁷³

(2) The defendant has been convicted of, or committed, a prior murder, a felony involving violence, or other serious felony.³⁷⁴

2000(e)(7) (Supp. 1996) ("The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws."); UTAH CODE ANN. § 76-5-202(1)(i)(iv) (Supp. 1997) ("[T]he homicide was committed for the purpose of . . . (iv) disrupting or hindering any lawful governmental function or enforcement of laws.").

³⁷¹ See MO. ANN. STAT. § 565.032.2(17) (West Supp. 1997) ("The murder was committed during the commission of a crime which is part of a pattern of criminal street gang activity . . ."); WASH. REV. CODE ANN. § 10.95.020 (6) (West Supp. 1997) ("The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.").

³⁷² See NEV. REV. STAT. ANN. § 200.033(9) (Michie 1997) ("The murder was committed upon one or more persons at random and without apparent motive.").

³⁷³ See IDAHO CODE § 19-2515(h)(8) (1997) ("The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society."); OKLA. STAT. ANN. tit. 21, § 701.12(7) (West 1983) ("The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."); OR. REV. STAT. § 163.150(b)(B) (1996) ("Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."); TEX. CRIM. P. CODE ANN. § 37.071(b)(1) (West Supp. 1997) ("[W]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."); VA. CODE ANN. § 19.2-264.2(1) (Michie 1995) ("[T]here is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society."); WYO. STAT. ANN. § 6-2-102(h)(xi) (Michie 1997) ("The defendant poses a substantial and continuing threat of future dangerousness or is likely to commit continued acts of criminal violence.").

In Washington, this factor is considered only after a defendant is convicted of aggravated first-degree murder by a finding of at least one aggravating circumstance. See WASH. REV. CODE ANN. § 10.95.020 (West Supp. 1997) (listing aggravating circumstances for aggravated first degree murder); *id.* § 1095.070(8) ("Whether there is a likelihood that the defendant will pose a danger to others in the future.").

³⁷⁴ See 18 U.S.C. § 3592(c) (1994) ("Previous conviction of violent felony involving firearm," "Previous conviction of offense for which a sentence of death or life imprisonment was authorized," "Previous conviction of other serious offenses," "Conviction for two felony drug offenses," "Conviction for serious Federal drug offenses," or "Prior

conviction of sexual assault or child molestation"); ALA. CODE § 13A-5-49(2) (1994) ("The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person."); ARIZ. REV. STAT. ANN. § 13-703(F)(1) (West Supp. 1996) ("The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable."); *id.* § 13-703(F)(2) (West 1989) ("The defendant was previously convicted of a serious offense, whether preparatory or completed."); ARK. CODE ANN. § 5-4-604(3) (Michie Supp. 1995) ("The person previously committed another felony, an element of which was the use or threat of violence to another person or the creation of a substantial risk of death or serious physical injury to another person."); CAL. PENAL CODE § 190.2(a)(2) (Deering 1997) ("The defendant was convicted previously of murder in the first or second degree."); COLO. REV. STAT. § 16-11-802(5)(b) (Supp. 1996) ("The defendant was previously convicted in this state of a class 1 or 2 felony involving violence . . . or was previously convicted by another state or the United States of an offense which would constitute a class 1 or 2 felony involving violence . . ."); CONN. GEN. STAT. § 53a-46a(i)(2) (1997):

[T]he defendant committed the offense after having been convicted of two or more state offenses or two or more federal offenses or of one or more state offenses and one or more federal offenses for each of which a penalty of more than one year imprisonment may be imposed, which offenses were committed on different occasions and which involved the infliction of serious bodily injury upon another person;

DEL. CODE ANN. tit. 11, § 4209(e)(1)(i) (Supp. 1996) ("The defendant was previously convicted of another murder or manslaughter or of a felony involving the use of, or threat of, force or violence upon another person."); FLA. STAT. ANN. § 921.141(5)(b) (West Supp. 1997) ("The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."); GA. CODE ANN. § 17-10-30(b)(1) (1997) ("The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony."); IDAHO CODE § 19-2515(h)(1) (1997) ("The defendant was previously convicted of another murder."); 720 ILL. COMP. STAT. 5/9-1(b)(3) (West Supp. 1997):

The defendant has been convicted of murdering two or more individuals . . . regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate acts which the defendant knew would cause death or create a strong probability of death or great bodily harm to the murdered individual or another;

IND. CODE ANN. § 35-50-2-9(b)(7) (Michie Supp. 1997) ("The defendant has been convicted of another murder."); *id.* § 35-50-2-9(b)(8) ("The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder."); KAN. STAT. ANN. § 21-4625(1) (1995) ("The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another."); KY. REV. STAT. ANN. § 532.025(a)(1) (Michie Supp. 1996) ("The offense of murder or kidnapping was committed by a person with a prior record of conviction for a capital offense, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions."); LA. CODE CRIM. PROC. ANN. art. 905.4(3) (West 1997) ("The offender has been previously convicted of an unrelated murder, aggravated rape, aggravated burglary,

aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.”); MISS. CODE ANN. § 99-19-101(5)(b) (Supp. 1997) (“The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.”); MO. ANN. STAT. § 565.032.2(1) (West Supp. 1997) (“The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions.”); MONT. CODE ANN. § 46-18-303(2) (1997) (“The offense was deliberate homicide and was committed by a defendant who had been previously convicted of another deliberate homicide.”); NEB. REV. STAT. § 29-2523(1)(a) (1995) (“The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity.”); NEV. REV. STAT. ANN. § 200.033(2) (Michie 1997) (“The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder . . . is or has been convicted of: (a) Another murder . . . or (b) A felony involving the use or threat of violence to the person of another”); N.H. REV. STAT. ANN. § 630.5(VII)(b) (1996) (“The defendant has been convicted of another state or federal offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by law”); *id.* § 630.5(VII)(c) (“The defendant has previously been convicted of 2 or more state or federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person.”); N.J. STAT. ANN. § 2C:11-3(4)(a) (West Supp. 1997) (“The defendant has been convicted, at any time, of another murder.”); N.Y. PENAL LAW § 125.27(1)(a)(ix) (McKinney Supp. 1997) (“[P]rior to committing the killing, the defendant had been convicted of murder”); *id.* § 125.27(1)(a)(xi) (“[T]he defendant intentionally caused the death of two or more additional persons within the state in separate criminal transactions within a period of twenty-four months when committed in a similar fashion or pursuant to a common scheme or plan.”); N.C. GEN. STAT. § 15A-2000(e)(2) (Supp. 1996) (“The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.”); *id.* § 15A-2000(e)(3):

The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult;

OHIO REV. CODE ANN. § 2929.04(A)(5) (Baldwin-Banks 1997):

Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender;

OKLA. STAT. ANN. tit. 21, § 701.12 (1) (West 1983) (“The defendant was previously convicted of a felony involving the use or threat of violence to the person.”); 42 PA. CONS. STAT. ANN. § 9711(d)(9) (West Supp. 1997) (“The defendant has a significant history of felony convictions involving the use or threat of violence to the person.”); *id.* § 9711(d)(10):

The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life

(3) The capital offense was committed by a person who is incarcerated, has escaped, is on probation, is in jail, or is under a sentence of imprisonment.³⁷⁵

imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense; 42 PA. CONS. STAT. ANN. § 9711(d)(12) (West Supp. 1997) ("The defendant has been convicted of voluntary manslaughter . . . or a substantially equivalent crime in any other jurisdiction, committed either before or at the time of the offense at issue."); S.C. CODE ANN. § 16-3-20(C)(a)(2) (Law Co-op. Supp. 1996) ("The murder was committed by a person with a prior conviction for murder."); S.D. CODIFIED LAWS § 23A-27A-1(1) (Michie Supp. 1997) ("The offense was committed by a person with a prior record of conviction for a Class A or Class B felony, or the offense of murder was committed by a person who has a felony conviction for a crime of violence . . ."); TENN. CODE ANN. § 39-13-204(i)(2) (1997) ("The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person."); UTAH CODE ANN. § 76-5-202(1)(h) (Supp. 1997) ("[T]he actor was previously convicted of aggravated murder, murder, or of a felony involving the use or threat of violence to a person."); WYO. STAT. ANN. § 6-2-102(h)(ii) (Michie 1997) ("The defendant was previously convicted of another murder in the first degree or a felony involving the use or threat of violence to the person.").

Note that several jurisdictions have more than one aggravating circumstance that is a variation on this factor.

³⁷⁵ See ALA. CODE § 13A-5-49(1) (1994) ("The capital offense was committed by a person under sentence of imprisonment."); ARIZ. REV. STAT. ANN. § 13-703(F)(7) (West Supp. 1996) ("The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail."); COLO. REV. STAT. § 16-11-802(5)(a) (Supp. 1996) ("The class 1 felony was committed by a person under sentence of imprisonment for a class 1, 2, or 3 felony . . ."); DEL CODE ANN. tit. 11, § 4209(e)(1)(a) (Supp. 1996) ("The murder was committed by a person in, or who has escaped from, the custody of a law-enforcement officer or place of confinement."); *id.* § 4209(e)(1)(n) ("The defendant was under a sentence of life imprisonment, whether for natural life or otherwise, at the time of the commission of the murder."); FLA. STAT. ANN. § 921.141(5)(a) (West Supp. 1997) ("The capital felony was committed by a person . . . under sentence of imprisonment or placed on community control or on felony probation."); GA. CODE ANN. § 17-10-30(b)(9) (1997) ("The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement."); 720 ILL. COMP. STAT. 5/9-1(b)(10) (West Supp. 1997):

[T]he defendant was incarcerated in an institution or facility of the Department of Corrections at the time of the murder, and while committing an offense punishable as a felony under Illinois law, or while engaged in a conspiracy or solicitation to commit such offense, intentionally killed an individual or counseled, commanded, induced, procured or caused the intentional killing of the murdered individual;

IND. CODE ANN. § 35-50-2-9(b)(9) (Michie Supp. 1997) ("The defendant was: (A) under the custody of the department of correction; (B) under the custody of a county sheriff; (C) on probation after receiving a sentence for the commission of a felony; or (D) on parole; at the time the murder was committed."); KAN. STAT. ANN. § 21-4625(7)

(1995) ("The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony."); KY. REV. STAT. ANN. § 532.025(2)(a)(5) (Michie 1996) ("The offense of murder was committed by a person who was a prisoner and the victim was a prison employee engaged at the time of the act in the performance of his duties."); LA. CODE CRIM. PROC. ANN. art. 905.4(6) (West 1997) ("The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony."); MD. ANN. CODE art. 27, § 413(d)(2) (1996) ("The defendant committed the murder at a time when he was confined in any correctional institution."); MISS. CODE ANN. § 99-19-101(5)(a) (Supp. 1997) ("The capital offense was committed by a person under sentence of imprisonment."); MO. ANN. STAT. § 565.032.2(9) (West Supp. 1997) ("The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement."); MONT. CODE ANN. § 46-18-303(1) (1997) ("The offense was deliberate homicide and was committed by a person serving a sentence of imprisonment in the state prison."); NEV. REV. STAT. ANN. § 200.033(1) (Michie 1997) ("The murder was committed by a person under sentence of imprisonment."); N.M. STAT. ANN. § 31-20A-5(D) (Michie Supp. 1997) ("[W]hile incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in or lawfully on the premises of a penal institution in New Mexico"); N.Y. PENAL LAW § 125.27(1)(a)(iv) (McKinney Supp. 1997):

[T]he defendant was confined in a state correctional institution or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the killing, the defendant had escaped from such confinement or custody while serving such a sentence and had not yet been returned to such confinement or custody;

N.C. GEN. STAT. § 15A-2000(e)(1) (1996) ("The capital felony was committed by a person lawfully incarcerated."); OHIO REV. CODE ANN. § 2929.04(A)(4) (Banks-Baldwin 1997) ("The offense was committed while the offender was a prisoner in a detention facility . . ."); OKLA. STAT. ANN. tit. 21, § 701.12(6) (West Supp. 1997) ("The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony."); S.D. CODIFIED LAWS § 23A-27A-1(8) (Michie Supp. 1997) ("The offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement."); TENN. CODE ANN. § 39-13-204(i)(8) (Supp. 1997) ("The murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful confinement or during the defendant's escape from lawful custody or from a place of lawful confinement."); UTAH CODE ANN. § 76-5-202(1)(a) (Supp. 1997) ("[T]he homicide was committed by a person who is confined in a jail or other correctional institution."); WASH. REV. CODE ANN. § 10.95.020(2) (West Supp. 1997) ("[T]he person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes."); *id.* § 10.95.020(3) ("[T]he person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony."); WYO. STAT. ANN. § 6-2-102(h)(i) (Michie 1997) ("The murder was committed by a person: (A) Confined in a jail or correctional facility; (B) On parole or on probation for a felony; (C) After escaping detention or incarceration; or (D) Released on bail pending appeal of

- (4) The defendant was a criminal street gang member.³⁷⁶
 (5) The defendant was a drug dealer or has prior convictions involving the distribution of a controlled substance.³⁷⁷

d. *Victim's Status*

- (1) The victim was under a certain age.³⁷⁸

his conviction."); *see also* TEX. PENAL CODE ANN. § 19.03(a)(5) (West Supp. 1997) (including as part of the definition of capital murder: "the person, while incarcerated in a penal institution, murders another: (A) who is employed in the operation of the penal institution; or (B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination"); *id.* § 19.03(a)(6) (including as part of the definition of capital murder: "the person: (A) while incarcerated for an offense under this section or Section 19.02, murders another; or (B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04, 22.021, or 29.03, murders another"); UTAH CODE ANN. § 76-5-202(1)(p) (Supp. 1996) ("[T]he actor was under a sentence of life imprisonment or a sentence of death at the time of the commission of the homicide."); *cf.* MONT. CODE ANN. § 46-18-303(8) (1997) (listing incarceration as a capital aggravating factor for nonhomicide offenses of attempted deliberate homicide, aggravated assault, or aggravated kidnapping).

³⁷⁶ *See* FLA. STAT. ANN. § 921.141(5)(n) (West Supp. 1997) ("The capital felony was committed by a criminal street gang member.").

³⁷⁷ *See* 720 ILL. COMP. STAT. 5/9-1(b)(9) (West Supp. 1997) ("[T]he defendant, while committing an offense punishable under [several sections] of the Illinois Controlled Substances Act, or while engaged in a conspiracy or solicitation to commit such offense, intentionally killed an individual or counseled, commanded, induced, procured or caused the intentional killing of the murdered individual"); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(11) (West 1997) ("The offender was engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance"); N.H. REV. STAT. ANN. § 630:5(VII)(d) (1996) ("The defendant has previously been convicted of 2 or more state or federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance."); N.J. STAT. ANN. § 2C:11-3c(4)(i) (West Supp. 1997):

The defendant: (i) as a leader of a narcotics trafficking network . . . and in furtherance of a conspiracy . . . committed, commanded or by threat or promise solicited the commission of the offense or (ii) committed the offense at the direction of a leader of a narcotics trafficking network . . . in furtherance of a conspiracy

³⁷⁸ *See* 18 U.S.C. § 3592 (c)(11) (1994) ("The victim was particularly vulnerable due to old age, youth, or infirmity."); ARIZ. REV. STAT. ANN. § 13-703(F)(9) (West Supp. 1997) ("The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age"); DEL. CODE ANN. tit. 11, § 4209(e)(1)(s) (Supp. 1997) ("The victim was a child 14 years of age or younger, and the murder was committed by an individual who is at least 4 years older than the victim."); FLA. STAT. ANN. § 921.141(5)(l) (West Supp. 1997) ("The victim of the capital felony was a person less than 12 years of age."); 720 ILL. COMP. STAT. 5/9-

- (2) The victim was over a certain age.³⁷⁹
- (3) The victim was especially vulnerable due to mental or physical disability

1(b)(7) (West Supp. 1997) ("[T]he murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty."); IND. CODE ANN. § 35-50-2-9(b)(12) (Michie Supp. 1997) ("The victim of the murder was less than twelve (12) years of age."); LA. CODE CRIM. PROC. ANN. art. 905.4(10) (West 1997) ("The victim was under the age of twelve years . . ."); NEV. REV. STAT. ANN. § 200.033(10) (Michie 1997) ("The murder was committed upon a person less than 14 years of age."); N.H. REV. STAT. ANN. § 630:5(VII)(g) (1996) ("The victim was particularly vulnerable due to old age, youth, or infirmity."); N.J. STAT. ANN. § 2C:11-3c(4)(k) (West Supp. 1997) ("The victim was less than 14 years old."); OHIO REV. CODE ANN. § 2929.04(A)(9) (Banks-Baldwin 1997):

The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design;

42 PA. CONS. STAT. ANN. § 9711(d)(16) (West Supp. 1997) ("The victim was a child under 12 years of age."); S.C. CODE ANN. § 16-3-20(C)(a)(10) (Law Co-op. Supp. 1996) ("The murder of a child eleven years of age or under."); S.D. CODIFIED LAWS § 23A-27A-1(6) (Michie Supp. 1997) ("Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age."); TENN. CODE ANN. § 39-13-204(i)(1) (Supp. 1997) ("The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older."); WYO. STAT. ANN. § 6-2-102(h)(ix) (Michie 1997) ("The defendant knew or reasonably should have known the victim was less than seventeen (17) years of age . . ."); *see also* TEX. PENAL CODE ANN. § 19.03(a)(8) (West Supp. 1997) (including as part of the definition of capital murder: "the person murders an individual under six years of age").

Some statutes contain aggravating circumstances for the case of a defendant who was in the process of committing a felony that involves a child. *See* CAL. PENAL CODE § 190.2(a)(17)(E) (West 1997); MD. ANN. CODE art. 27, § 413(d)(5) (1997); MISS. CODE ANN. § 99-19-101(5)(d) (Supp. 1997); MONT. CODE ANN. § 46-18-303(9) (1997).

³⁷⁹ *See* 18 U.S.C. § 3592(c)(11) (1994) ("The victim was particularly vulnerable due to old age, youth, or infirmity."); ARIZ. REV. STAT. ANN. § 13-703(F)(9) (West Supp. 1997) ("The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was . . . seventy years of age or older."); DEL. CODE ANN. tit. 11, § 4209(e)(1)(r) (Supp. 1997) ("The victim was 62 years of age or older."); FLA. STAT. ANN. § 921.141(5)(m) (West Supp. 1997) ("The victim of the capital felony was particularly vulnerable due to advanced age or disability . . ."); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(10) (West 1997) ("The victim was . . . sixty-five years of age or older."); N.H. REV. STAT. ANN. § 630:5(VII)(g) (1996) ("The victim was particularly vulnerable due to old age, youth, or infirmity."); WYO. STAT. ANN. § 6-2-102(h)(ix) (Michie 1997) ("The defendant knew or reasonably should have known the victim was . . . older than sixty-five (65) years of age."). A bill making it an aggravating factor if the victim is at least 70 years old presently awaits the signature of Tennessee's governor. *See* Tom Sharp, 'Lottie's Law' OK's Age Factor for Crimes, COMMERCIAL APPEAL (Memphis, TN), March 31, 1998, at A13.

or because the defendant was in a position of familial or custodial authority over the victim.³⁸⁰

(4) The victim was pregnant.³⁸¹

(5) The victim was a government employee, including peace officers, police officers, federal agents, firefighters, judges, jurors, defense attorneys, and prosecutors, in the course of his or her duties.³⁸²

³⁸⁰ See DEL. CODE ANN. tit. 11, § 4209(e)(1)(q) (Supp. 1997) ("The victim was severely handicapped or severely disabled."); FLA. STAT. ANN. § 921.141(5)(m) (West Supp. 1997) ("The victim of the capital felony was particularly vulnerable due to . . . disability, or because the defendant stood in a position of familial or custodial authority over the victim."); N.H. REV. STAT. ANN. § 630:5(VII)(g) (1996) ("The victim was particularly vulnerable due to old age, youth, or infirmity."); TENN. CODE ANN. § 39-13-204(i)(14) (Supp. 1997) ("The victim of the murder was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such handicap or disability."); WYO. STAT. ANN. § 6-2-102(h)(x) (Michie 1997) ("The defendant knew or reasonably should have known the victim was especially vulnerable due to significant mental or physical disability.").

³⁸¹ See DEL. CODE ANN. tit. 11, § 4209(e)(1)(p) (Supp. 1997) ("The victim was pregnant."); 42 PA. CONS. STAT. ANN. § 9711(d)(17) (West Supp. 1997) ("At the time of the killing, the victim was in her third trimester of pregnancy or the defendant had knowledge of the victim's pregnancy.").

³⁸² See 18 U.S.C. § 3592(c)(14) (1994) ("The defendant committed the offense against . . . (D) a Federal public servant who is a judge [or] a law enforcement officer . . . " during official duties or because of his or her status); ARIZ. REV. STAT. ANN. § 13-703(F)(10) (West Supp. 1996) ("The murdered individual was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the victim was a peace officer."); CAL. PENAL CODE § 190.2(a)(7)-(9), (11)-(13), (20) (Deering 1997) (listing aggravating factors for when the victim was a peace officer, a federal law enforcement officer or agent, a firefighter, a prosecutor, assistant prosecutor, a former prosecutor, a former assistant prosecutor, a judge, a former judge, a juror, or an elected or appointed official, and the killing relates to the victim's duties); COLO. REV. STAT. § 16-11-802(5)(c)(I)-(IV) (Supp. 1996) (providing for an aggravating factor when the victim was a peace officer, former peace officer, firefighter, judge, referee, former judge, former referee, elected official, federal law enforcement officer or agent, or former federal law enforcement officer or agent, and the killing relates to the victim's duties); DEL. CODE ANN. tit. 11, § 4209(e)(1)(d) (Supp. 1997):

The murder was committed against a judicial officer, a former judicial officer, Attorney General, former Attorney General, Assistant or Deputy Attorney General or former Assistant or Deputy Attorney General, State Detective or former State Detective, Special Investigator or former Special Investigator, during, or because of, the exercise of an official duty;

FLA. STAT. ANN. § 921.141(5)(j) (West Supp. 1997) ("The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties."); GA. CODE ANN. § 17-10-30(b)(5) (1997) ("The murder of a judicial officer, former judicial officer, district attorney or solicitor-general, or former district attorney,

solicitor, or solicitor-general was committed during or because of the exercise of his or her official duties.”); *id.* § 17-10-30(b)(8) (1997) (“The offense of murder was committed against any peace officer . . . or fireman while engaged in the performance of his official duties.”); IDAHO CODE § 19-2515(h)(9) (1997) (“The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty.”); 720 ILL. COMP. STAT. 5/9-1(b)(1) (West Supp. 1997):

[T]he murdered individual was a peace officer or fireman killed in the course of performing his official duties, to prevent the performance of his official duties, or in retaliation for performing his official duties, and the defendant knew or should have known that the murdered individual was a peace officer or fireman;

IND. CODE ANN. § 35-50-2-9(b)(6) (Michie Supp. 1997) (“The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer, fireman, judge, or law enforcement officer” and the murder related to the victim’s duties); KY. REV. STAT. ANN. § 532.025(2)(a)(7) (Michie 1996) (“The offender’s act of killing was intentional and the victim was a state or local public official or police officer, sheriff, or deputy sheriff engaged at the time of the act in the lawful performance of his duties.”); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(2) (West 1997) (“The victim was a fireman or peace officer engaged in his lawful duties.”); MD. ANN. CODE art. 27, § 413(d)(1) (1997) (“The victim was a law enforcement officer who was murdered while in the performance of his duties.”); MO. ANN. STAT. § 565.032.2(5) (West Supp. 1997):

The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer . . . during or because of the exercise of his official duty;

id. § 565.032.2(8) (“The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty.”); MONT. CODE ANN. § 46-18-303(6) (1997) (“The offense was deliberate homicide . . . and the victim was a peace officer killed while performing the officer’s duty.”); NEB. REV. STAT. § 29-2523(1)(g) (1995) (“The victim was a law enforcement officer or a public servant having custody of the offender or another.”); NEV. REV. STAT. ANN. § 200.033(7) (Michie 1997):

The murder was committed upon a peace officer or fireman who was killed while engaged in the performance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or fireman;

N.J. STAT. ANN. § 2C:11-3c(4)(h) (West Supp. 1997) (“The defendant murdered a public servant . . . while the victim was engaged in the performance of his official duties, or because of the victim’s status as a public servant.”); N.M. STAT. ANN. § 31-20A-5(A) (Michie Supp. 1997) (“[T]he victim was a peace officer who was acting in the lawful discharge of an official duty when he was murdered.”); N.Y. PENAL LAW § 125.27(1)(a)(i), (ii) (Consol. Supp. 1997) (providing an aggravating factor for when the intended victim was a police officer or a peace officer “who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was such [an officer]”);

id. § 125.27(1)(a)(xii) (“[T]he intended victim was a judge . . . and the defendant killed such victim because such victim was, at the time of the killing, a judge.”); N.C. GEN. STAT. § 15A-2000(e)(8) (1996):

The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty;

OHIO REV. CODE ANN. § 2929.04(A)(6) (Banks-Baldwin 1997):

The victim of the offense was a peace officer . . . whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in the victim’s duties, or it was the offender’s specific purpose to kill a peace officer;

OKLA. STAT. ANN. tit. 21, § 701.12(8) (West Supp. 1997) (“The victim of the murder was a peace officer . . . and such person was killed while in performance of official duty.”); 42 PA. CONS. STAT. ANN. § 9711(d)(1) (West Supp. 1997):

The victim was a firefighter, peace officer, public servant concerned in official detention . . . judge of any court in the unified judicial system, the Attorney General of Pennsylvania, a deputy attorney general, district attorney, assistant district attorney . . . State law enforcement official, local law enforcement official, Federal law enforcement official or person employed to assist or assisting any law enforcement official in the performance of his duties, who was killed in the performance of his duties or as a result of his official position;

S.C. CODE ANN. § 16-3-20(C)(a)(5), (7) (Law Co-op. Supp. 1996) (providing as an aggravating factor a murder that occurs during or because of the performance of official duties of a judicial officer, former judicial officer, solicitor, former solicitor, other officer of the court, peace officer, former peace officer, fireman, former fireman or federal, state, or local law enforcement officer); S.D. CODIFIED LAWS § 23A-27A-1(4) (Michie Supp. 1997):

The defendant committed the offense on a judicial officer, former judicial officer, prosecutor, or former prosecutor while such prosecutor, former prosecutor, judicial officer, or former judicial officer was engaged in the performance of such person’s official duties or where a major part of the motivation for the offense came from the official actions of such judicial officer, former judicial officer, prosecutor, or former prosecutor;

id. § 23A-27A-1(7) (“The offense was committed against a law enforcement officer . . . or fire fighter while engaged in the performance of such person’s official duties.”); TENN. CODE ANN. § 39-13-204(i)(9) (Supp. 1997) (“The murder was committed against any law enforcement officer . . . or firefighter, who was engaged in the performance of official duties, and the defendant knew or reasonably should have known that such victim was a law enforcement officer . . . or firefighter engaged in the performance of official duties.”); *id.* § 39-13-204(i)(10):

The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of the victim’s official duty or status and the defendant knew that the victim occupied such office;

UTAH CODE ANN. § 76-5-202(1)(k) (Supp. 1997):

[T]he victim is or has been a peace officer, law enforcement officer, executive

(6) The victim was a correctional officer.³⁸³

officer, prosecuting officer, jailer, prison official, firefighter, judge or other court official, juror, probation officer, or parole officer, and the victim is either on duty or the homicide is based on, is caused by, or is related to that official position, and the actor knew, or reasonably should have known, that the victim holds or has held that official position;

WASH. REV. CODE ANN. § 10.95.020(1) (West Supp. 1997):

The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

id. § 10.95.020(8):

The victim was: (a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and (b) The murder was related to the exercise of official duties performed or to be performed by the victim;

WYO. STAT. ANN. § 6-2-102(h)(viii) (Michie 1997) ("The murder of a judicial officer, former judicial officer, district attorney, former district attorney, defending attorney, peace officer, juror or witness, during or because of the exercise of his official duty."); *see also* TEX. PENAL CODE ANN. § 19.03(a)(1) (West Supp. 1997) (including as part of the definition of capital murder: "the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman").

³⁸³ *See* 18 U.S.C. § 3592(c)(14) (1994) ("The defendant committed the offense against . . . (D) . . . an employee of a United States penal or correctional institution" in the course of his or her duties or "because of his or her status as a public servant"); GA. CODE ANN. § 17-10-30(b)(8) (1997) ("The offense of murder was committed against any . . . corrections employee . . . while engaged in the performance of his official duties."); 720 ILL. COMP. STAT. 5/9-1(b)(2) (West Supp. 1997):

[T]he murdered individual was an employee of an institution or facility of the Department of Corrections, or any similar local correctional agency, killed in the course of performing his official duties, to prevent the performance of his official duties, or in retaliation for performing his official duties . . . or the murdered individual was [not an employee or inmate and was] otherwise present in such institution or facility with the knowledge and approval of the chief administrative officer thereof;

KY. REV. STAT. ANN. § 532.025(2)(a)(5) (Michie 1996) ("The offense of murder was committed by a person who was a prisoner and the victim was a prison employee engaged at the time of the act in the performance of his duties."); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(9) (West 1997):

The victim was a correctional officer or any employee of the Department of Public Safety and Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense;

MO. ANN. STAT. § 565.032.2(13) (West Supp. 1997) ("The murdered individual was an employee of an institution or facility of the department of corrections of this state or local correction agency and was killed in the course of performing his official du-

(7) The victim was an inmate of a correction facility.³⁸⁴

(8) The victim was an elected official, a candidate for elected office, or in line of succession to the presidency.³⁸⁵

ties"); N.M. STAT. ANN. § 31-20A-5(E) (Michie Supp. 1997) ("[W]hile incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee of the corrections and criminal rehabilitation department."); N.Y. PENAL LAW § 125.27(1)(a)(iii) (Consol. Supp. 1997):

[T]he intended victim was an employee of a state correctional institution or was an employee of a local correctional facility . . . who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was an employee of a state correctional institution or a local correctional facility;

OKLA. STAT. ANN. tit. 21, § 701.12(8) (West Supp. 1997) ("The victim of the murder was a . . . guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty."); 42 PA. CONS. STAT. ANN. § 9711(d)(1) (West Supp. 1997) ("The victim was a . . . public servant concerned in official detention . . . who was killed in the performance of his duties or as a result of his official position."); S.C. CODE ANN. § 16-3-20(c)(a)(7) (Law Co-op. Supp. 1996) ("The murder of a . . . corrections employee or former corrections employee . . . during or because of the performance of his official duties."); S.D. CODIFIED LAWS § 23A-27A-1(7) (Michie Supp. 1997) ("The offense was committed against a[n] . . . employee of a corrections institution . . . while engaged in the performance of such person's official duties."); TENN. CODE ANN. § 39-13-204(i)(9) (Supp. 1997) ("The murder was committed against any . . . corrections official, corrections employee . . . who was engaged in the performance of official duties, and the defendant knew or reasonably should have known that such victim was a . . . corrections official, corrections employee . . . engaged in the performance of official duties.").

³⁸⁴ See MO. ANN. STAT. § 565.032.2(13) (West Supp. 1997) ("[T]he murdered individual was an inmate of such institution or facility.").

³⁸⁵ See 18 U.S.C. § 3592(c)(14) (1994) (listing the President of the United States, Vice-President, chief of state, head of government, foreign official, and so forth); CAL. PENAL CODE § 190.2(a)(13) (West 1997) ("The victim was an elected or appointed official or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties."); COLO. REV. STAT. § 16-11-802(5)(c)(IV) (Supp. 1996) (providing an aggravating factor for when the victim was "[a]n elected state, county, or municipal official" and the killing relates to the victim's duties); FLA. STAT. ANN. § 921.141(5)(k) (West Supp. 1997) ("The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity."); MO. ANN. STAT. § 565.032.2(5) (West Supp. 1997) ("The murder in the first degree was committed against a[n] . . . elected official or former elected official during or because of the exercise of his official duty."); N.J. STAT. ANN. § 2C:11-3c(4)(h) (West Supp. 1997) ("The defendant murdered a public servant . . . while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant."); OHIO REV. CODE ANN. § 2929.04(a)(1) (Banks-Baldwin 1997):

The offense was the assassination of the president of the United States or person

- (9) The victim was a family member of a government official.³⁸⁶
- (10) The murder was committed against a person held as a shield, as a hostage, or for ransom.³⁸⁷
- (11) The murder was committed against a witness, a potential witness, or a family member of a witness in a criminal or civil proceeding to prevent the witness from appearing, or for revenge.³⁸⁸

in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices;

42 PA. CONS. STAT. ANN. § 9711(d)(1) (West Supp. 1997) ("The victim was . . . the Attorney General of Pennsylvania, a deputy attorney general, district attorney, assistant district attorney, member of the General Assembly, Governor, Lieutenant Governor, Auditor General, State Treasurer . . . who was killed in the performance of his duties or as a result of his official position."); TENN. CODE ANN. § 39-13-204(i)(11) (Supp. 1997) ("The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official."); UTAH CODE ANN. § 76-5-202(1)(j) (Supp. 1997) ("[T]he victim is or has been a local, state, or federal public official, or a candidate for public office, and the homicide is based on, is caused by, or is related to that official position, act, capacity, or candidacy.").

³⁸⁶ See S.C. CODE ANN. § 16-3-20(C)(a)(8) (Law Co-op. Supp. 1996) ("The murder of a family member of an official [listed above] with the intent to impede or retaliate against the official.").

³⁸⁷ See COLO. REV. STAT. § 16-11-802(5)(d) (Supp. 1996) ("The defendant intentionally killed a person kidnapped or being held as a hostage by the defendant or by anyone associated with the defendant."); DEL. CODE ANN. tit. 11, § 4209(3)(1)(e) (Supp. 1997) ("The murder was committed against a person who was held or otherwise detained as a shield or hostage."); *id.* § 4209(3)(1)(f) ("The murder was committed against a person who was held or detained by the defendant for ransom or reward."); MD. ANN. CODE art. 27, § 413(d)(4) (1997) ("The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct."); *id.* § 413(d)(5) ("The victim was a child abducted . . ."); 42 PA. CONS. STAT. ANN. § 9711(d)(3) (West Supp. 1997) ("The victim was being held by the defendant for ransom or reward, or as a shield or hostage."); UTAH CODE ANN. § 76-5-202(1)(o) (Supp. 1997) ("[T]he victim was a person held or otherwise detained as a shield, hostage, or for ransom.").

³⁸⁸ See CAL. PENAL CODE § 190.2(a)(10) (West 1997):

The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding;

COLO. REV. STAT. § 16-11-802(5)(k) (Supp. 1996) ("The class 1 felony was committed for the purpose of avoiding or preventing a lawful arrest or prosecution or effecting an escape from custody. This factor shall include the intentional killing of a witness to a

criminal offense."); DEL. CODE ANN. tit. 11, § 4209(e)(1)(g) (Supp. 1997) ("The murder was committed against a person who was a witness to a crime and who was killed for the purpose of preventing the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime."); IDAHO CODE § 19-2515(h)(10) (1997) ("The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding."); 720 ILL. COMP. STAT. 5/9-1(b)(8) (West Supp. 1997):

[T]he defendant committed the murder with intent to prevent the murdered individual from testifying in any criminal prosecution or giving material assistance to the State in any investigation or prosecution, either against the defendant or another; or the defendant committed the murder because the murdered individual was a witness in any prosecution or gave material assistance to the State in any investigation or prosecution, either against the defendant or another.;

IND. CODE ANN. § 35-50-2-9(b)(14) (Michie Supp. 1996) ("The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant committed the murder with the intent to prevent the person from testifying."); KAN. STAT. ANN. § 21-4625(8) (1996) ("The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding."); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(8) (West 1997) ("The victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant."); MO. ANN. STAT. § 565.032.2(12) (West Supp. 1997) ("The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness."); N.M. STAT. ANN. § 31-20A-5(G) (Michie Supp. 1997) ("[T]he capital felony was murder of a witness to a crime or any person likely to become a witness to a crime, for the purpose of preventing report of the crime or testimony in any criminal proceeding, or for retaliation for the victim having testified in any criminal proceeding."); N.Y. PENAL LAW § 125.27 (1)(a)(v) (Consol. Supp. 1997):

[T]he intended victim was a witness to a crime committed on a prior occasion and the death was caused for the purpose of preventing the intended victim's testimony . . . or the intended victim had previously testified . . . and the killing was committed for the purpose of exacting retribution for such prior testimony, or the intended victim was an immediate family member of a witness . . . ;

N.C. GEN. STAT. § 15A-2000(e)(8) (1996) ("The capital felony was committed against a . . . witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty."); OHIO REV. CODE ANN. § 2929.04(A)(8) (Banks-Baldwin 1997):

The victim of the aggravated murder was witness to an offense who was purposefully killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding;

42 PA. CONS. STAT. ANN. § 9711(d)(5) (West Supp. 1997) ("The victim was a prosecu-

(12) The victim was a nongovernmental informant.³⁸⁹

(13) The murder was committed to interfere with the victim's First Amendment rights.³⁹⁰

tion witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses."); S.C. CODE ANN. § 16-3-20(C)(a)(11) (Law Co-op. Supp. 1996) ("The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime."); UTAH CODE ANN. § 76-5-202(1)(i) (Supp. 1997) ("[T]he homicide was committed for the purpose of: (i) preventing a witness from testifying; (ii) preventing a person from providing evidence or participating in any legal proceedings or official investigation; (iii) retaliating against a person for testifying, providing evidence, or participating in any legal proceedings or official investigation . . ."); WASH. REV. CODE ANN. § 10.95.020(8) (West Supp. 1997) ("The victim was: (a) A . . . current, or former witness in an adjudicative proceeding; . . . and (b) The murder was related to the exercise of official duties performed or to be performed by the victim."); *id.* § 10.95.020(9) ("The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender . . .").

The aggravating circumstance that the offense is related to a felony may also apply. *See supra* note 350. Also, arguably, aggravating factors dealing with offenses committed to effect an escape from prosecution could also apply to the murder of a witness. *See supra* note 369.

³⁸⁹ *See* DEL. CODE ANN. tit. 11, § 4209(e)(1)(t) (Supp. 1997):

At the time of the killing, the victim was or had been a nongovernmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity, and the killing was in retaliation for the victim's activities as a nongovernmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency;

LA. CODE CRIM. PROC. ANN. art. 905.4(A)(8) (West 1997) ("The victim . . . gave material assistance to the state in any investigation or prosecution of the defendant . . .");

42 PA. CONS. STAT. ANN. § 9711(d)(15) (West Supp. 1997):

At the time of the killing, the victim was or had been a nongovernmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity and the defendant committed the killing or was an accomplice to the killing . . . and the killing was in retaliation for the victim's activities as a nongovernmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency;

UTAH CODE ANN. § 76-5-202(1)(i) (Supp. 1997) ("[T]he homicide was committed for the purpose of . . . (ii) preventing a person from providing evidence or participating in any legal proceedings or official investigation; (iii) retaliating against a person for testifying, providing evidence, or participating in any legal proceedings or official investigation.").

³⁹⁰ *See* DEL. CODE ANN. tit. 11, § 4209(e)(1)(v) (Supp. 1997) ("The murder was committed for the purpose of interfering with the victim's free exercise or enjoyment of

(14) The victim was killed because of his or her race, color, religion, disability, sexual orientation, nationality, or country of origin.³⁹¹

(15) The victim was a newsreporter and the murder was committed to obstruct reporting activities of the victim.³⁹²

(16) The victim was involved, associated, or in competition with the defendant in the sale, manufacture, distribution, or delivery of any controlled substance or counterfeit controlled substance.³⁹³

Additionally, some jurisdictions have a list of further factors to be considered when at least one of the above factors has been found.³⁹⁴ The list in this Article reflects the range of aggravating factors used in the United States. No single jurisdiction has the complete list of forty-five statutory aggravating factors, but most jurisdictions incorporate many of these factors. As noted above, many states' death penalty statutes include a large number of these factors. To some extent, the large number of aggravating factors reflects a continuing genuine attempt by legislatures to define the "worst" crimes. Legislators want to protect all citizens from murder, and many believe that they can do so by making more defendants eligible for the death penalty. The result of this growing list of aggravating factors, however, is a broad range of factors that can make almost every first-degree murder de-

any right, privilege or immunity protected by the First Amendment to the United States Constitution, or because the victim has exercised or enjoyed said rights . . .").

³⁹¹ See CAL. PENAL CODE § 190.2(a)(16) (West 1997) ("The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin."); DEL. CODE ANN. tit. 11, § 4209(e)(1)(v) (Supp. 1997) ("The murder was committed . . . because of the victim's race, religion, color, disability, national origin or ancestry."); NEV. REV. STAT. ANN. § 200.033(11) (Michie 1995) ("The murder was committed upon a person because of the actual or perceived race, color, religion, national origin, physical or mental disability or sexual orientation of that person.").

³⁹² See WASH. REV. CODE ANN. § 10.95.020(12) (West Supp. 1997) ("The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim.").

³⁹³ See 42 PA. CONS. STAT. ANN. § 9711(d)(14) (West Supp. 1997):

At the time of the killing, the victim was or had been involved, associated or in competition with the defendant in the sale, manufacture, distribution or delivery of any controlled substance or counterfeit controlled substance . . . and the defendant committed the killing or was an accomplice to the killing . . . and the killing resulted from or was related to that association, involvement or competition to promote the defendant's activities

³⁹⁴ California has an additional list of factors that are considered once certain "special circumstances" are found. See CAL. PENAL CODE § 190.2 (West 1997) (listing special circumstances); *id.* § 190.3 (listing factors to be considered once at least one special circumstance has been found); see also WASH. REV. CODE ANN. § 1095.020 (West Supp. 1997) (listing aggravating circumstances for aggravated first-degree murder); *id.* § 1095.070 (listing other factors that may be considered in sentencing).

fendant eligible for the death penalty. In many states, in order not to be eligible for the death penalty, the murder must not be "cruel," must not be "heinous or depraved," must not be motivated by anything of value, must not endanger anyone else, and so on. Additionally, the victim must not be too old, too young, a government employee, and so forth. Finally, the defendant must not have a record, be incarcerated, be a future danger, et cetera. Thus, under the present death penalty scheme, an extremely broad range of murder scenarios make defendants eligible for the death penalty.

C. Conclusion

By broadening the death penalty and allowing limitations upon mitigation evidence, the courts and legislatures have continued a trend toward a mandatory death penalty scheme. Although the Court has increased its tolerance for arbitrariness, this tolerance has made the imposition of death sentences more likely.³⁹⁵ For example, the use of victim impact evidence, as well as other nonstatutory aggravating circumstances, simultaneously broadens the application of the death penalty and allows arbitrary factors to be considered. The increased arbitrariness has contributed to the progression toward mandatory death sentences.

Meanwhile, legislatures have continued to expand their death penalty statutes to cover new crimes. Some jurisdictions have even expanded their death penalty statutes to cover crimes in addition to murder,³⁹⁶ despite the

³⁹⁵ Other commentators have argued that the Court's capital jurisprudence is "pro-death." See Anthony G. Amsterdam, *In Favour of Mortis: The Supreme Court and Capital Punishment*, 1987 A.B.A. SEC. INDIVIDUAL RTS. & RESP. J. 14; Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455 (1996).

³⁹⁶ See, e.g., 18 U.S.C. § 3591(b)(1) (1994) (drug crimes); 18 U.S.C. § 2381 (1994) (capital punishment for treason); ARK. CODE ANN. § 5-51-201(c) (Michie 1997) (capital punishment for treason); CAL. PENAL CODE § 37 (West Supp. 1997) (capital punishment for treason); COLO. REV. STAT. § 18-3-301(c)(2) (1997) (kidnapping where victim suffered bodily injury is class 1 felony); FLA. STAT. ANN. § 921.142 (1996) (capital punishment for capital drug trafficking felonies); GA. CODE ANN. § 16-6-1 (1996) (capital punishment for rape); *id.* § 17-10-30 (capital punishment for aircraft hijacking or treason); IDAHO CODE § 18-4504 (1997) (capital punishment for kidnapping); LA. REV. STAT. ANN. § 14:42(D)(1) (West Supp. 1998) (capital punishment for aggravated rape if the victim is under the age of twelve years); *id.* § 14:113 (1986) (capital punishment for treason); MISS. CODE ANN. § 97-25-55(1) (1994) (capital punishment for aircraft piracy); *id.* § 97-7-67 (capital punishment for treason); MONT. CODE ANN. § 46-18-220 (1997) (capital punishment where defendant is convicted of attempted deliberate homicide, aggravated assault, or aggravated kidnapping, while incarcerated); N.M. STAT. ANN. § 20-12-42 (1978) (capital punishment for espionage); WASH. REV. CODE ANN. § 9A.02.010 (1988) (capital punishment for treason); see also *State v. Wilson*, 685 So. 2d 1063 (La. 1996) (upholding the application of the death penalty for the rape of a victim

Court's conclusion in *Coker v. Georgia*³⁹⁷ that the Eighth Amendment prohibited the death penalty in a nonmurder case.

As discussed earlier, the Court has moved away from its concerns about arbitrariness and instead has focused only on the "narrowing" aspect of aggravating factors. Under the Court's present scheme, aggravating factors have a lesser role both in eliminating arbitrariness and in narrowing the application of the death penalty. Arguably, as long as there is one first-degree murderer who is not eligible for a death sentence under the statute, a constitutional narrowing has occurred.³⁹⁸ Of course, not every murder defendant receives a death sentence. The net is growing, however, and those who escape a death sentence are increasingly spared only by the arbitrary nature of the system.

The argument that today's death penalty system is becoming mandatory is supported by a recent study of North Carolina capital jurors.³⁹⁹ In this study, psychology Professor James Luginbuhl and doctoral student Julie Howe noted several factors that push jurors toward imposing death sentences. These factors include the fact that jurors begin a sentencing phase with a

who is under twelve years old), *cert. denied*, 117 S. Ct. 2425 (1997) (denying the petition for writ of certiorari with a statement by three Justices noting that such a denial is not made on the merits and that the judgment of the lower court may not have been final); John Q. Barrett, *Death for Child Rapists May Not Save Children*, NAT'L L.J., Aug. 18, 1997, at A21 (noting progress in Georgia, Montana, and Pennsylvania to expand death penalty to rape crimes); Michael Higgins, *Is Capital Punishment for Killers Only?*, A.B.A. J., August 1997, at 30 (noting that fourteen jurisdictions impose the death penalty for crimes other than homicides).

³⁹⁷ 433 U.S. 584 (1977). In *Coker*, the Court struck down the application of Georgia's death penalty to defendants convicted of raping an adult woman. *See id.* at 600. Recently, the Utah Supreme Court followed *Coker* in applying the Eighth Amendment to strike down as excessive a statute providing for the application of the death penalty in situations of aggravated assault. *See State v. Gardner*, Nos. 950330, 950344, 1997 WL 597437, at *26 (Utah Sept. 30, 1997) (holding that section 76-5-103.5(2)(b) of the Utah Code violates the Eighth Amendment to the United States Constitution).

³⁹⁸ In a recent article, Professors Carol Steiker and Jordan Steiker noted that the Court has repudiated "channeling" as a separate constitutional requirement while instead focusing on "narrowing." *See Steiker & Steiker, supra* note 98, at 382. In other words, through cases such as *Pulley v. Harris*, 465 U.S. 37 (1984) (holding that appellate proportionality review is not constitutionally required), the Court in recent years has stressed only that the class of those receiving death sentences must be narrower than the class of all murderers. Professors Steiker and Steiker conclude, "Under current doctrine, a state could choose to limit death-eligibility through its definition of capital murder (as several states have), and then simply ask the sentencer to decide punishment in light of any aggravating or mitigating factors that the sentencer deems significant." Steiker & Steiker, *supra* note 98, at 384. Indeed, New York later created a similar system. *See N.Y. CRIM. PROC. LAW* § 400.27 (Consol. 1996).

³⁹⁹ *See James Luginbuhl & Julie Howe, Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995).

substantial bias in favor of death,⁴⁰⁰ the fact that aggravating circumstances may be easier to prove than mitigating circumstances,⁴⁰¹ and confusing jury instructions.⁴⁰² The authors noted that "it is disturbing that roughly one-fourth of the jurors felt that death was mandatory when it was not and approximately one-half of the jurors failed to appreciate those situations which mandated life. . . . [T]hat translates into three out of twelve jurors who feel that death is mandated."⁴⁰³ The authors also noted several other misconceptions held by capital jurors that weighed on the side of imposing a death sentence.⁴⁰⁴

The Court's initial rejection of mandatory death sentences in *Woodson* took place during a time when the Court was increasing its regulation of the death penalty. Since then, the Court has backed away from regulating the system while tolerating more vagueness and arbitrariness that broaden the group of defendants eligible for the death penalty. Also during this time, legislatures have been expanding their death penalty statutes.⁴⁰⁵

⁴⁰⁰ See *id.* at 1180. "[T]he tilt towards death suggests that a defendant with a confused jury may receive a death sentence by default, without having a chance to benefit from legal standards designed to give him a chance for life." *Id.*; see also William J. Bowers, *Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1093 tbl. 9 (1995) (reporting that a significant number of jurors made up their minds about the punishment before the penalty phase began).

⁴⁰¹ See Luginbuhl & Howe, *supra* note 399, at 1180.

If aggravating factors are either true or false on their face, then proving to the jury, beyond a reasonable doubt, the existence of an aggravating factor (such as the defendant's having been previously arrested for a violent crime) imposes no particular burden on the prosecution. However, just "satisfying" jurors that a particular quality of the crime or the defendant has mitigating value may be quite difficult for the defense.

Id.

⁴⁰² See *id.*

⁴⁰³ *Id.* at 1173.

⁴⁰⁴ See *id.* at 1180. They concluded

that (a) only three-fifths of the jurors are likely to consider all the appropriate mitigating factors; (b) less than one-half will require the appropriate burden of proof for mitigating factors; (c) less than one-half will understand that unanimity is not required to find a mitigating factor; and (d) only one-third will understand that a sentence of life is required if the mitigating factors outweigh the aggravating factors.

Id.

⁴⁰⁵ In addition to the expansion of individual statutes, the trend is further illustrated by New York's recent adoption of a death penalty statute that has been criticized as being aimed at obtaining a large number of death sentences. See Mary R. Falk & Eve Cary, *Death-Defying Feats: State Constitutional Challenges to New York's Death Penalty*, 4 J.L. & POL'Y 161, 223-26 (1995). Professors Falk and Cary argue that because New York's statute accomplishes the narrowing function at the guilt phase of a capital trial, it is a "capital sentencing scheme [that] is designed to result in the imposition of

Similarly, during this same time period, the Court has made several rulings that decrease federal review of state capital cases in spite of the increasing likelihood that defendants with meritorious claims of federal constitutional violations will be executed.⁴⁰⁶ Following this trend, Congress recently passed the Antiterrorism and Effective Death Penalty Act, which substantially limits federal review of capital cases.⁴⁰⁷ The Court's habeas corpus decisions and Congress's recent Act have contributed to the mandatory nature of today's death penalty scheme. Thus several factors have accelerated the drive toward a mandatory death penalty scheme.

IV. CAN TODAY'S ARBITRARY MANDATORY DEATH SENTENCING SCHEME OF AGGRAVATING AND MITIGATING FACTORS BE FIXED?—FIVE VIEWS

I have no objection to giving them [juries] this dispensing power, but it should be given to them directly and not in a mystifying cloud of words.⁴⁰⁸

the death penalty by a jury that does not understand the implications of its actions or by one that is organized to impose a sentence of death." *Id.* at 223.

⁴⁰⁶ See, e.g., *Sawyer v. Whitley*, 505 U.S. 333 (1992) (creating a strict "actually innocent of the death penalty" exception to successive habeas petitions); *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (holding that federal courts are no longer required to grant a hearing on a state prisoner's habeas corpus challenge, even if the prisoner can show that the defense lawyer did not properly present crucial facts of the case in a state court appeal); *Coleman v. Thompson*, 501 U.S. 722 (1991) (holding that because there is no right to effective assistance of counsel in state post-conviction proceedings, an attorney's error in filing a petition late was not "cause" for Coleman's procedural default, and that the federal courts would not hear his claims); *McCleskey v. Zant*, 499 U.S. 467 (1991) (adopting a stricter rule for defendants who did not raise a claim in a first habeas petition); *Teague v. Lane*, 489 U.S. 288 (1989) (holding that "new rules" will not apply to benefit a defendant if that defendant was in post-conviction proceedings at the time the Court announced the rule); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (creating a stricter rule for defendants bringing claims that were procedural defaulted in state court).

Recently, in *O'Dell v. Netherland*, 117 S. Ct. 1969 (1997), the Court addressed the application to habeas petitioner O'Dell of a Supreme Court decision that allowed a capital defendant to inform his jury that he is not eligible for parole if the prosecution argues the defendant's future dangerousness. The Court in *O'Dell* held that the previous decision was a new rule under *Teague* and could not apply to habeas petitioner O'Dell. O'Dell thus was executed despite the constitutional violation in his case. See Associated Press, *Man Executed Despite Protest From the Pope*, N.Y. TIMES, July 24, 1997, at A18.

⁴⁰⁷ See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

⁴⁰⁸ BENJAMIN CARDOZO, *What Medicine Can Do For Law*, in LAW AND LITERATURE 70, 100 (1931) (criticizing the system of vague degrees of murder to determine which murders were capital), quoted in *McGautha v. California*, 402 U.S. 183, 199 (1971).

In attempting to serve the two goals of (1) individualized sentencing⁴⁰⁹ and (2) eliminating arbitrariness by channeling discretion and narrowing the group eligible for the death penalty,⁴¹⁰ the Court has attempted to walk a fine line between mandatory death sentences and total discretionary capital sentencing. In doing so, the Court has created a system of aggravating and mitigating factors that retains many of the evils of both mandatory sentencing and discretionary sentencing. In order to provide for individualized sentencing, the Court has had to allow a certain level of arbitrariness; and, in order to try to curb the arbitrariness, the Court has attempted to limit some of the discretion.

Various developments, probably unseen by the *Furman* Justices, have resulted in a capital sentencing scheme that in many ways is both mandatory and arbitrary. Through the Court's tolerance of nonstatutory aggravating circumstances and broad statutory aggravating circumstances, as well as state legislatures' roles in broadening the death penalty, death penalty statutes have progressed toward being mandatory. Although the death penalty is not imposed on all death-eligible defendants, the trend since the early 1980s, however, has been toward making such situations less likely. The result is a progression toward mandatory death sentences—a trend that is openly embraced by some of the Supreme Court Justices.⁴¹¹

As the Court has moved toward mandatory capital sentencing, it also has moved toward a more arbitrary scheme. The Court's initial concerns about the arbitrary use of the death penalty have evolved into a single concern of narrowing, that is, a concern that some murderers are eliminated from the death-eligible pool at some point. Once some murderers are eliminated from that pool, the Court is less concerned about arbitrariness. Recent decisions by the Court permit more arbitrariness than the early post-*Furman* cases appeared to tolerate.

Therefore, the Supreme Court's death penalty jurisprudence, after rejecting both total discretionary and mandatory sentencing schemes, paradoxically has created a system of aggravating and mitigating factors that has the problems of both schemes. In an attempt to establish a fair sentencing scheme for individually unique defendants and unlimited types of murder, perhaps such a result is inevitable. In *McGautha*, Justice Harlan recognized that fact: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express

⁴⁰⁹ See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that the Eighth Amendment requires that the sentencer "not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death").

⁴¹⁰ See, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (striking down the vague application of an aggravating factor).

⁴¹¹ See discussion *infra* Part IV.D.

these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."⁴¹² If the Constitution still requires that the death penalty be imposed in a fair manner, however, the Court should be examining ways to mend the constitutional infirmity of today's arbitrary mandatory death sentencing scheme.

Five main options address the concerns expressed in this Article. One option is to keep the current system. At least one commentator has declared the Court's jurisprudence in this area a mild success.⁴¹³ A federal judge has proposed a legislative solution to limit the application of the death penalty,⁴¹⁴ while other commentators have proposed a judicial solution along the same lines.⁴¹⁵ Another option is to return to the pre-*Furman* days of unguided discretion.⁴¹⁶ Some of the commentators, as well as some Supreme Court Justices, have addressed inconsistencies in the Court's reasoning regarding the dilemma of individualized sentencing and arbitrariness. Because of this dilemma, two Justices have abandoned the notion of individualized sentencing,⁴¹⁷ while two others have given up altogether on the constitutionality of the death penalty.⁴¹⁸ These analyses are discussed below.

A. *The View That the Court's Capital Punishment Jurisprudence Works*

As discussed throughout this Article, the Court's attempt to walk the line between mandatory death sentences and total discretionary sentences has been a failure. Although few would argue that the Court has created an ideal capital sentencing scheme, perhaps there are some benefits to it. Despite the problems, the present system attempts to combine the evenhandedness of a mandatory death penalty with the individualized justice of an unguided discretion scheme. While not the ideal system, perhaps it is the best possible system.

In a recent article, Professor David McCord took the rare position that the Court's decisions in this area have created a scheme that works to some extent. Professor McCord discussed the Court's concerns with "overinclusiveness," meaning "the imposition of death sentences on defendants who are not among the 'worst' murderers,"⁴¹⁹ and

⁴¹² *McGautha v. California*, 402 U.S. 183, 204 (1971).

⁴¹³ See discussion *infra* Part IV.A.

⁴¹⁴ See *infra* notes 451-57 and accompanying text.

⁴¹⁵ See *infra* notes 458-60 and accompanying text.

⁴¹⁶ See discussion *infra* Part IV.C.

⁴¹⁷ See discussion *infra* Part IV.D.

⁴¹⁸ See discussion *infra* Part IV.E.

⁴¹⁹ McCord, *supra* note 295, at 546.

"underinclusiveness," meaning "the imposition of death sentences on only some, rather than all, equally culpable murderers."⁴²⁰ His article contained three conclusions that are relevant to the scope of this Article. First, he concluded that the Court is concerned only with narrowing, or overinclusiveness, and not general arbitrariness.⁴²¹ Professor McCord argued that "the Court has had only one primary goal for its regulation of capital punishment: decreasing *overinclusion*, with particular interest in minimizing invidious overinclusion due to racial bias."⁴²² Second, Professor McCord concluded,

The best available evidence shows that the Court's regulatory death penalty jurisprudence *has* been successful in decreasing overinclusion, which is the primary vice that the Court has seen in death penalty systems for the last quarter of a century. . . . [L]et's give credit where credit is due—the populations of death rows since 1972 very likely comprise a more carefully selected and "worse" collection of malefactors than before 1972. This is not an insignificant achievement.⁴²³

Third, Professor McCord concluded that this improvement is a result of the Court's present death penalty jurisprudence.⁴²⁴ Each of these arguments is addressed below.

1. *The Court Has Expressed Concern with General Arbitrariness*

The main problem with Professor McCord's conclusion that the Court is not concerned with underinclusiveness is that he redefines the Court's goal to fit with the result. Professor McCord concluded that because the Court was not successful in eliminating arbitrariness, then that must not have been its goal.⁴²⁵ Professor McCord cited several other instances in which the Court has expressed concern with arbitrariness,⁴²⁶ yet he argued that be-

⁴²⁰ *Id.*

⁴²¹ *See id.* at 548.

⁴²² *Id.*

⁴²³ *Id.* at 593; cf. *Woodson v. North Carolina*, 428 U.S. 280, 315 (1976) (Rehnquist, J., dissenting). In his dissenting opinion in *Woodson*, Justice Rehnquist stated that the concern in *Furman* "arose not from the perception that so *many* capital sentences were being imposed but from the perception that so *few* were being imposed." *Id.* (Rehnquist, J., dissenting).

⁴²⁴ *See* McCord, *supra* note 295 at 591-93.

⁴²⁵ *See id.* at 593.

⁴²⁶ *See id.* at 554-56.

cause the Court set up various procedural protections for defendants, the Court was not concerned about general arbitrariness or underinclusion.⁴²⁷ However, the Court—at least the plurality Justices in *Furman*—would not agree that the sole goal was to decrease the number of people sentenced to death.⁴²⁸ The Court, at least initially, was concerned about arbitrariness.⁴²⁹ As the Court explained, states “must administer [the death] penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.”⁴³⁰ As Justice Scalia noted in his concurrence in *Walton*, “[W]e have repeatedly incanted the principle that ‘unbridled discretion’ is unacceptable.”⁴³¹ In a 1987 decision, the Court noted that *Furman* struck down the absolute discretion statutes because they “resulted in the death penalty’s being arbitrarily and capriciously imposed, in violation of the Eighth and Fourteenth Amendments.”⁴³²

⁴²⁷ See *id.* at 567-72. Professor McCord argued that the Court’s decisions holding that jurors with scruples against capital punishment cannot be struck for cause, rejecting a mandatory death penalty, requiring individualized sentencing, and requiring lesser-included offense instructions, as well as the Court’s refusal to limit prosecutorial discretion, show that the Court was not concerned with underinclusion in general. See *id.* More likely, however, these decisions reflect the Court’s attempts to develop a more accurate system, rather than indicate a lack of concern about arbitrariness. Such a conclusion would be more consistent with the Court’s expression of concern about arbitrariness in other cases.

Professor McCord also pointed to *McCleskey v. Kemp*, 481 U.S. 279 (1987), in which the Court held that McCleskey’s death sentence did not violate the Eighth Amendment when Georgia’s sentencing procedures focused discretion on the aspects of the crime and on the defendant. See McCord, *supra* note 295, at 571. As discussed earlier, *McCleskey* to some extent is illustrative of a Court that has realized that it has developed a capital punishment system that cannot combat arbitrariness. The Court, however, has not always envisioned that the system it helped develop would permit so much arbitrariness. Indeed, had the Justices been able to foresee the capital punishment scheme that would result, the outcome of *McCleskey* would have been different. See *supra* note 10 (noting Justice Powell’s change of view).

⁴²⁸ See *Furman v. Georgia*, 408 U.S. 238 (1972).

⁴²⁹ See *supra* notes 75-85 and accompanying text.

⁴³⁰ *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). In *Jurek v. Texas*, 428 U.S. 262 (1976), the Court noted:

By providing prompt judicial review of the jury’s decision in a court with state-wide jurisdiction, Texas has provided a means to promote *the evenhanded, rational, and consistent* imposition of death sentences under law. Because this system serves to assure that sentences of death will not be “wantonly” or “freakishly” imposed, it does not violate the Constitution.

Id. at 276 (emphasis added).

⁴³¹ *Walton v. Arizona*, 497 U.S. 639, 660 (1990) (Scalia, J., concurring).

⁴³² *Sumner v. Shuman*, 483 U.S. 66, 70 (1987) (striking down Nevada’s mandatory death penalty statute).

Professor McCord is correct that the Court's recent cases taken together lead to the conclusion that the Court is mainly concerned about narrowing, not arbitrariness.⁴³³ In fact, the authors of the article that Professor McCord was criticizing, Professors Carol and Jordan Steiker, would agree with him on this point.⁴³⁴ McCord's conclusion thus has merit with regard to the direction in which the Court is headed. Arbitrariness has become less of a concern for the Court—but only because the Court has come to the apparent conclusion that it cannot fix it.⁴³⁵ If *Furman*, *Gregg*, and other cases still have any significance, however, arbitrariness should remain a constitutional concern. Today, the selection of who dies among eligible defendants is still like being struck by lightning. Professor McCord and the Steikers seem to agree that the Court in practice does not care about whether the death penalty is arbitrary but does care that some sort of narrowing of those eligible for the death penalty occurs.⁴³⁶ Because of the direction taken by the Court in this regard, the death penalty remains arbitrary.

2. *Today's Mandatory Death Penalty is Overinclusive*

Although Professor McCord correctly concluded that the Court is concerned with overinclusiveness,⁴³⁷ the Court has not solved that problem. It is impossible to accurately define who are the "worst murderers." While some murderers more easily fall into this category than others, there is still a point where it becomes difficult to define who are the "worst murderers." In trying to do so, the Court and legislatures have substantially broadened that definition. Thus, the progression by the Court and legislatures toward a mandatory death penalty, by expanding its application, has resulted in today's overinclusive death penalty.

Professor McCord evaluated twenty-five capital cases to support his conclusion that Georgia's system is not overinclusive, i.e., that based upon various factors, all of those defendants deserved death sentences. In making his determination, McCord listed a broad range of aggravating factors, or "exacerbating motifs," to conclude that the twenty-five defendants deserved

⁴³³ See McCord, *supra* note 295, at 573-79.

⁴³⁴ See Steiker & Steiker, *supra* note 98, at 384 (noting "[t]he Court's focus on narrowing as the sole constitutionally required means of addressing arbitrariness in capital sentencing—to the exclusion of both channeling and proportionality review").

⁴³⁵ Professor McCord agrees that the Court has determined that it cannot regulate general arbitrariness. "As to *mundane* underinclusion, I believe the Court has recognized that it is beyond the Court's power to regulate, short of complete abolition of the death penalty, a step the Court has never been willing to take." McCord, *supra* note 295, at 547-48.

⁴³⁶ See *id.* at 548; Steiker & Steiker, *supra* note 98, at 384.

⁴³⁷ See McCord, *supra* note 295, at 548.

death sentences.⁴³⁸ His analysis is a good attempt at defining "overinclusiveness," but it further illustrates the problems of defining who are the worst murderers. By roughly setting the bounds of "overinclusiveness" by using the present scheme's aggravating factors, it is no surprise that the scheme is within those bounds. The problem, as discussed above in Part III, is that the bounds themselves are too broad, which has resulted in an overinclusive death penalty.

3. *The Improvements in Modern Capital Sentencing Are Not Necessarily Due to the Court's Present Capital Sentencing Scheme*

Professor McCord attributed any improvements to capital sentencing in the last twenty years to the Court's guided discretion scheme.⁴³⁹ It is unclear, however, the degree to which the death penalty sentencing scheme developed after *Furman* directly created any improvements in the system.⁴⁴⁰ As the Fund lawyers and other defense attorneys began to specialize in the complexities of capital defense litigation around the time of the *Furman* decision, the quality of the representation of defendants on death row increased, peaking with the creation of the death penalty resource centers in the 1980s.⁴⁴¹ The resource centers were staffed by qualified attorneys who represented indigent defendants and who trained other capital defense attorneys. Although in 1995 Congress eliminated funding for the resource centers and despite numerous examples of poor capital representation,⁴⁴² the representation and training given by the resource center lawyers and other capital defense attorneys, among other factors, has contributed to a higher awareness of the type of evidence defense attorneys should present at sentencing hearings. True, part of this awareness was an indirect result of the litigation surrounding *Furman* and *Gregg*, but that result does not mean

⁴³⁸ *Id.* at 582-90.

⁴³⁹ *See id.* at 579-90, 593.

⁴⁴⁰ *See, e.g.,* Luginbuhl & Howe, *supra* note 399, at 1181 (concluding from a study of North Carolina jurors that their comprehension of sentencing criteria is "mediocre," reducing "the likelihood that capital defendants will benefit from the safeguards against arbitrariness").

⁴⁴¹ *See* Kimbalu R. Anderson & Bruce R. Braun, *Capital Pro Bono Demand Is Up*, NAT'L L.J., Aug. 19, 1996, at B9; Mark Hansen, *With Federally Funded Appeals from Capital Punishment on the Way Out, Lawyers are Wrestling with Questions About Who Will Pursue the Arguments to Keep Condemned Inmates From Death's Door*, A.B.A. J., June 1996, at 58.

⁴⁴² *See* Bob Herbert, *The Hanging Tree*, N.Y. TIMES, Jan. 6, 1997, at A5; *see also supra* note 300; cf. Bilionis & Rosen, *supra* note 300, at 1370 ("As mounting criticism from virtually every relevant quarter attests, the basic post-*Gideon* model for providing court-appointed lawyers to indigent defendants is failing to supply attorneys who can fulfill the more trying and more specialized demands of modern capital litigation.").

that the system itself was better. Further, many of the procedural safeguards the Court instituted, such as bifurcated trials⁴⁴³ and no limits on mitigation evidence,⁴⁴⁴ are not inconsistent with a pre-*Furman* unguided discretion system. Therefore, improvements over the pre-*Furman* system are not necessarily a result of the Court's creation of a guided discretion scheme.

4. *Although Professor McCord May Be Correct That the Present System Has Benefits over the Unguided Discretion System, It Is Far from Being a Success*

A more recent and broader statistical sampling than the ones used by Professor McCord might lend more support to his claim that the present system works better than an unguided discretion system. Yet, statistics such as the ones used in *McCleskey v. Kemp*—that defendants who kill white victims are 4.3 times more likely to receive the death penalty than those who kill black victims⁴⁴⁵—raise serious questions. Still, Professor McCord is probably to some extent correct that today's overall capital punishment system is fairer than the unguided discretion system.

The system, however, is not *much* better, and many of the improvements are not necessarily a result of the guided discretion system. Although the present system has made some small progress toward achieving a fairer sentencing system, it has not come close to the Eighth Amendment goals envisioned by the Court in *Furman*. Under the Court's jurisprudence, the constitutional problems of the present arbitrary and mandatory system render it a failure.

B. *The View That the Application of the Death Penalty Should Be Limited*

Defendants who are sentenced to death in the United States have been convicted of a broad range of types of murder. On June 13, 1997, a jury voted to sentence Timothy McVeigh to death for the 1995 Oklahoma City bombing that killed 168 people and injured 850 others.⁴⁴⁶ Three days later, with almost no publicity, David Stoker was executed in Huntsville, Texas, for the 1986 murder of a convenience store clerk during a robbery of ninety-six dollars.⁴⁴⁷ On the same day as Mr. Stoker's execution, an Ohio

⁴⁴³ See *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁴⁴⁴ See *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

⁴⁴⁵ See *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987); see also *supra* notes 399-404 and accompanying text (discussing a study of North Carolina jurors that concluded that one-fourth of those jurors felt that the death penalty was mandatory when it was not).

⁴⁴⁶ See Jo Thomas, *The Oklahoma City Bombing: The Verdict; McVeigh Jury Decides on Sentence of Death in Oklahoma Bombing*, N.Y. TIMES, June 14, 1997, at 1.

⁴⁴⁷ See *Texas carries out its 22nd execution of the year*, DEUTSCHE PRESSE-

judge ruled that Wilford Berry, who was also condemned for killing a person during a robbery, was competent to waive his appeals and seek his own execution.⁴⁴⁸ Also on the same day, Jonathan Bunton pleaded guilty to murdering a person during a robbery in Texas and received a life sentence.⁴⁴⁹ Similarly, three days later, Giang Van Tran was convicted in California of capital murder and received a life sentence for killing a business owner during a robbery attempt.⁴⁵⁰

Certainly, each crime was a tragedy, as all murders result in lost lives, cause great grief to the families of the victims, and harm society. Because the Court has rejected mandatory death sentences for all murderers, however, the problem arises as to where to draw the line between capital murder and noncapital murder.

In a recent article, Ninth Circuit Court of Appeals Judge Alex Kozinski and Sean Gallagher proposed a solution to the time delay between sentence and execution,⁴⁵¹ the economic costs of the death penalty,⁴⁵² and the "lack of finality"⁴⁵³ associated with the capital punishment system. This

AGENTUR, June 17, 1997, available in LEXIS, News Library, Dpa File; Associated Press, *W. Texas Man Executed for Killing Store Clerk*, DALLAS MORNING NEWS, June 17, 1997, at A19.

⁴⁴⁸ See James Bradshaw, *Judge: Killer May Choose Execution*, COLUMBUS DISPATCH (Ohio), June 17, 1997, at B1.

⁴⁴⁹ See Dave Harmon, *Plea Gets Killer Life Sentence*, AUSTIN AMERICAN-STATESMAN, June 17, 1997, at B1.

⁴⁵⁰ See Eric Garcia, *Man Gets Life Term In '95 Murder of Jeweler*, DALLAS MORNING NEWS, June 20, 1997, at A38.

⁴⁵¹ See Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 10-11 (1995).

Putting aside the relatively few cases in which a death row inmate simply gives up, a case that comes to its conclusion within seven years of the crime is relatively rare. Ten years is about the average, and cases like that of Duncan Peder McKenzie, whose case took over two decades to shuttle its way repeatedly between the state and federal courts, are not all that atypical.

Id. (footnotes omitted).

⁴⁵² See *id.* at 11-16.

California reportedly spends \$90,000,000 each year on the death penalty. With 395 death row inmates, that is over \$200,000 per inmate per year. Using that number as a benchmark, that means California has already spent over \$450,000,000 on the death penalty this decade. What can California show for its efforts? It's had all of two executions since it passed its post-*Furman* death statute in 1972.

Id. at 13-14 (footnotes omitted).

⁴⁵³ *Id.* at 17-20.

While only a tiny percentage of state and federal criminal cases are reversed on direct appeal, the rate of reversal in death cases approaches 50%. In federal courts, habeas petitions are granted in less than 7% of cases, but the figure for death cases peaked in 1982 at 80% and averaged around 40% between 1978 and

solution would also address some of the problems discussed in this Article. In order to create a more economical and efficient capital punishment scheme, Judge Kozinski and Mr. Gallagher propose limiting the number of people sentenced to death to a smaller number of the worst offenders.⁴⁵⁴ They reasoned:

Increasing the number of crimes punishable by death, widening the circumstances under which death may be imposed, obtaining more guilty verdicts, and expanding the population of death rows will not do a single thing to accomplish the objective, namely to ensure that the very worst members of our society—those who, by their heinous and depraved conduct have relinquished all claim to human compassion—are put to death.⁴⁵⁵

Thus, contrary to the current trend in the states of expanding the application of the death penalty, the solution of Mr. Gallagher and Judge Kozinski is to narrow the application of the death penalty to a smaller group of defendants.

Judge Kozinski and Mr. Gallagher, however, did not see the problem they were addressing as a constitutional problem and were only making a suggestion as to how to make the system more efficient.⁴⁵⁶ Such a solution “means that the people, through their elected representatives, will reassert meaningful control over this process, rather than letting the courts and chance perform the accommodation on an ad hoc, entirely irrational basis.”⁴⁵⁷

Other commentators, however, have seen the problem of broad statutes and have proposed a similar, court-imposed solution. In another recent article, Professors Carol Steiker and Jordan Steiker noted that one way the Court could address the problem of capital sentencing arbitrariness would be

1991.

Id. at 17 (footnotes omitted).

⁴⁵⁴ *See id.* at 29-32.

⁴⁵⁵ *Id.* at 29 (footnotes omitted). For a discussion of heinous and depraved conduct as an aggravating factor, see *supra* notes 127-62 and accompanying text.

⁴⁵⁶ The view of Judge Kozinski and Mr. Gallagher has been echoed in the media. In a recent newspaper editorial, Waldo Proffitt, after stating that he supports the use of the death penalty, noted that

Americans and Floridians are over-using the death penalty. We invoke it too often, too-hastily, too sloppily, and then we warehouse condemned prisoners on death rows for an average of 10 years, thus assuring that we will lose whatever we might hope to gain from the deterrent value of swift and certain punishment.

Waldo Proffitt, *Death Penalty Debate Off Target*, SARASOTA HERALD-TRIB. (Fla.), Aug. 3, 1997, at 3F.

⁴⁵⁷ Kozinski & Gallagher, *supra* note 451, at 32.

to limit the number of individuals eligible for the death penalty.⁴⁵⁸ One way that the Court could regulate the selection of those sentenced to death would be to "require states to genuinely narrow the class of the death-eligible by adopting more limited definitions of capital murder and by restricting both the number and breadth of aggravating circumstances."⁴⁵⁹ In other words, the Court could impose a requirement that the number of death-eligible defendants somehow corresponds to the number of people who receive death sentences.⁴⁶⁰

Perhaps a narrower selection of capital defendants would result in a more efficient death penalty, as Judge Kozinski and Mr. Gallagher suggest. Unfortunately, they did not explain exactly how the selection of capital defendants could be narrowed in a fair way. Further, their solution still would not address many of the other problems discussed in this Article. Other problems still would exist if the Court were to continue to allow non-statutory aggravating circumstances, vague aggravating circumstances, and victim impact statements.

As a practical matter, the political solution Judge Kozinski and Mr. Gallagher proposed is unlikely to occur unless the present political climate changes drastically. The trend in legislatures is to expand the death penalty and to add aggravating circumstances instead of deleting them.⁴⁶¹ Even judges have felt political pressure to impose death sentences, and in some instances, state supreme court justices have been voted off the bench where they have been perceived as being too lax in enforcing the death penalty.⁴⁶² Legislators and other politicians are also aware of and respond to

⁴⁵⁸ See Steiker & Steiker, *supra* note 98, at 414.

⁴⁵⁹ *Id.* at 415.

⁴⁶⁰ Professors Steiker and Steiker explain:

The Court need not specify what kinds of offenses or offenders are most deserving of the death penalty so much as insist that the absolute number of death-eligible offenders corresponds in some meaningful sense to the proportion of offenders who will actually receive the death penalty. Thus, if experience over the past two decades reflects that one percent of all murders results in a death sentence, the class of the death-eligible should not be tremendously greater than, say, five or ten percent of all murderers.

Id.

⁴⁶¹ See *supra* notes 334-37 (discussing several instances of the death penalty as a political issue); see also Rod Allee, *A Voice is Raised Against Capital Punishment*, RECORD, June 25, 1997, at L01 (noting that New Jersey assemblyman Al Steele criticized a bill that would extend New Jersey's death penalty to 16- and 17-year olds as a "'knee-jerk, just-to-get-elected' proposal"); Scott Graham, *Want Quicker Executions? Bring Fewer Death Cases*, RECORDER, July 11, 1997, at 4 (stating that the death penalty should be reserved for the worst offenders and that "[i]nstead, legislators in Sacramento this week proposed making even more criminals eligible for execution").

⁴⁶² See generally Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75

this political pressure.⁴⁶³ Thus, while such a political solution would address many of the problems discussed in this Article, such a solution is unlikely to occur.

The judicial version Professors Steiker and Steiker discuss is somewhat more feasible, although it would require that the Court take a new direction.⁴⁶⁴ The practical problem with the solution, however, is the difficulty

B.U. L. REV. 759 (1995) (discussing the effects of political pressure in capital cases). For example, in 1996, in Tennessee, state supreme court Justice Penny J. White was voted off the bench in a retention election after a number of groups campaigned against her because of one decision whereby she voted for a new death sentencing hearing for a defendant. See John Gibeaut, *Taking Aim*, A.B.A. J., Nov. 1996, at 50, 51. During the campaign, the Republican Party sent a brochure to voters with the slogan, "Vote for Capital Punishment by Voting NO on August 1 for Supreme Court Justice Penny White." Stephen B. Bright, *Hanging the Judge; Demagogues, Politicians Chip Away at U.S. Court System*, ARIZ. REPUBLIC, June 8, 1997, at H1. After Justice White was removed from the court, several legislative candidates spoke out to let voters know that they favor capital punishment. Associated Press, *White Fall Has Hopefuls Boosting Death Penalty*, CHATTANOOGA FREE PRESS, Oct. 8, 1996, at A7.

In 1986, Chief Justice Rose Bird, along with two other California Supreme Court justices, was overwhelmingly voted out of office following a campaign that focused on her votes to reverse death sentences. See Maura Dolan, *Rose Bird's Quest for Obscurity*, L.A. TIMES, Nov. 15, 1995, at A1; Adam Pertman, *Judge's Obscurity After Vote a 'Tragedy'*, BOSTON GLOBE, May 19, 1996, at 2. Also, in 1994, Texas voters swept Judge Charles Campbell, a conservative former prosecutor with twelve years as a judge, off the Court of Criminal Appeals and elected an obscure lawyer who vowed to uphold more death sentences—even though the lawyer had been caught misrepresenting his background prior to the election. See Stuart Taylor, Jr., *The Politics of Hanging Judges*, LEGAL TIMES, Oct. 30, 1995, at 25.

⁴⁶³ See David Yepsen, *Democrats and Death Penalty*, DES MOINES REG., Feb. 10, 1997, at 7 (noting that the death penalty issue has been used in political campaigns to defeat those opposed to the death penalty); Editorial, *Polly Klaas and the Pols*, WASH. POST, Oct. 24, 1996, at A20 (noting that Republican congressional candidates in California have used the Polly Klaas murder case to attack opponents who are against the death penalty, including the use of one advertisement in which the face of a Democratic candidate is morphed into the face of the murderer).

⁴⁶⁴ Judge Kozinski and Mr. Gallagher note:

The judicial solution would require a wholesale repudiation of the Eighth Amendment case law developed by the Supreme Court over the last quarter century. This is not nearly as easy to accomplish as it might seem, even when seven of the current Justices were appointed by fairly conservative Republican Presidents. The essential teaching of *Furman* is that death really is different, and that the Constitution calls for an extraordinary measure of caution before the state may take human life. While this conclusion may not be required by the constitutional text, it surely is permitted and as we learned a few terms back in *Planned Parenthood v. Casey*, conservative Justices are reluctant to revisit major constitutional judgments reached by earlier Courts.

Kozinski & Gallagher, *supra* note 451, at 28-29 (footnotes omitted).

in arriving at a certain limit on the number of aggravating circumstances required by the Constitution. It seems impossible to draw a line and conclude that five aggravating factors are too many or that the Constitution requires the execution of a specific percentage of murderers. The Court's jurisprudence gives no guidance as to how the Court could arrive at such a resolution.

Also, such a solution would not address the broad application of individual aggravating factors. As the Steikers noted, it is difficult to narrowly predict, in advance, which crimes should be subject to the death penalty.⁴⁶⁵ For example, in theory, the aggravating factors that seem to most satisfy the retributive and deterrent goals of the death penalty are the "future danger" and "heinous, atrocious, or cruel" aggravating factors. As discussed above,⁴⁶⁶ however, those factors are so sweeping, vague, and broad that they potentially include almost every murder.

Another problem with narrowing the present scheme is the arbitrariness that would remain from the use of nonstatutory aggravating factors, victim impact statements, and the broad range of mitigating factors. Thus, although the narrowing proposals potentially limit the mandatory nature of the present scheme, they are unworkable and do not address the arbitrary nature of today's scheme of aggravating and mitigating factors.⁴⁶⁷

C. The View That the Court Should Return to the Days of Unguided Discretion

One option that perhaps would eliminate the problems of today's mandatory death penalty would be for the Court to once again sanction unguided discretion sentencing statutes as it did in *McGautha*.⁴⁶⁸ Arguably, returning to such a system would eradicate the mandatory nature of today's system by resulting in fewer situations in which jurors feel that they have no choice but to impose a death sentence because of a finding of several vague aggravating circumstances and little mitigation.⁴⁶⁹ Under the present scheme, jurors may feel compelled to return a verdict of death when they are instructed that they should not be swayed by sympathy.⁴⁷⁰ On the other

⁴⁶⁵ "The central drawback to such forced narrowing is that it might force states to exclude factors from their definitions of capital murder that actually do capture the worst offenses and offenders." Steiker & Steiker, *supra* note 98, at 416.

⁴⁶⁶ See *supra* notes 127-99 and accompanying text.

⁴⁶⁷ Nor does forced narrowing "resolve the inevitable difficulties associated with prosecutorial and sentencer discretion to choose who receives death within that narrowed group." Steiker & Steiker, *supra* note 98, at 417.

⁴⁶⁸ *McGautha v. California*, 402 U.S. 183, 221 (1971).

⁴⁶⁹ See *supra* notes 399-404 and accompanying text (discussing a study that found a number of jurors believed the death penalty was mandatory).

⁴⁷⁰ See *California v. Brown*, 479 U.S. 538, 540 (1987) (upholding the constitutional-

hand, in the case of some horrible homicides that would not fall within any typical aggravating factor, the sentencer would still have the option to impose a death sentence.

Further, returning to unguided discretion in capital sentencing would be more honest in acknowledging the arbitrary nature of the process of selecting who dies and who is sentenced to life in prison. Under today's system, there is the misleading appearance of a rational selection process. A return to unguided discretion would be an acceptance of Justice Harlan's conclusion that the task of identifying in clear language before the fact which murderers deserve the death penalty is "beyond present human ability."⁴⁷¹ Of the options discussed here, the unguided discretion route would require the Court to make the least change in direction. Indeed, the Court has never overruled *McGautha*, which held that such a scheme does not violate the Fourteenth Amendment.⁴⁷²

Still, the return to unguided discretion has few, if any, champions. No Supreme Court Justice currently argues for a return to the days of unguided discretion, when the death penalty was "so wantonly and so freakishly imposed."⁴⁷³ Lawyers generally acknowledge that today's system, which attempts to give guidance, is at least marginally better than a system that provides no guidance at all.⁴⁷⁴ A return to unguided discretion would not solve the serious problems of the arbitrariness of today's system, but would add further arbitrariness and discretion by expanding the sentencer's ability to base the sentence on racial or other arbitrary factors.

D. *The View That the Court Should Abandon the Individualized Sentencing Requirement*

A return to unguided discretion would not cure the arbitrariness problems of today's death penalty scheme, but perhaps a return to a mandatory death penalty scheme would eliminate arbitrariness. Such an idea has gained the support of some members of the Supreme Court.

As noted earlier in this Article, Justices Scalia and Thomas have noted the inconsistency between the Court's dual concerns of individualized sentencing, which derived from the *Woodson/Lockett* line of cases, and of chan-

ity of the jury instruction that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling").

⁴⁷¹ See *McGautha*, 402 U.S. at 204.

⁴⁷² See *id.* at 196.

⁴⁷³ *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

⁴⁷⁴ See generally McCord, *supra* note 295. "I doubt that there is one experienced capital defense lawyer in this country who would rather return to the pre-*Furman* era. Perhaps not even many prosecutors would want to return to the days before *Furman*, when such an unguided power of life and death rested in their hands." *Id.* at 593.

neled discretion, which derived from *Furman*.⁴⁷⁵ As Justice Scalia stated in *Walton*, "to refer to the two lines as pursuing 'twin objectives' . . . is rather like referring to the twin objectives of good and evil. They cannot be reconciled."⁴⁷⁶ Justice Scalia thus has concluded that the requirements regarding mitigating evidence destroy any predictability in the capital punishment system⁴⁷⁷ and that a mandatory death sentencing scheme does not violate the Eighth Amendment.⁴⁷⁸

Similarly, Justice Thomas has criticized the conflict that exists between the Court's goal of preventing capricious death penalty decisions and the requirement that juries consider mitigating evidence.⁴⁷⁹ In *Graham v. Collins*,⁴⁸⁰ Justice Thomas asserted that the Court's rejection of mandatory death sentences and the Court's mitigating evidence requirement both contribute to racial discrimination in capital sentencing.⁴⁸¹ While Justice Thomas did not go as far as Justice Scalia, he argued that states should be permitted to limit the relevance of mitigating evidence in a reasonable manner.⁴⁸²

Justice Scalia's solution is logical: If two principles are inconsistent, then one must go. Additionally, under Justice Scalia's originalist interpretation of the Bill of Rights, "a punishment can never be unusual if it existed when the Bill of Rights was ratified or if it was approved by a legislature

⁴⁷⁵ See *Graham v. Collins*, 506 U.S. 461, 487-500 (1993) (Thomas, J., concurring).

⁴⁷⁶ *Walton v. Arizona*, 497 U.S. 639, 664 (1990) (Scalia, J., concurring); see also *Johnson v. Texas*, 509 U.S. 350, 373-74 (1993) (Scalia, J., concurring) (noting that the *Furman* principle and the *Lockett/Eddings* principle are incompatible).

⁴⁷⁷ See *Walton*, 497 U.S. at 664-65 (Scalia, J., concurring); see also *Sochor v. Florida*, 504 U.S. 527, 554 (1992) (Scalia, J., concurring in part and dissenting in part) ("It has been my view that the Eighth Amendment does not require any consideration of mitigating evidence . . . a view I am increasingly confirmed in, as the byzantine complexity of the death penalty jurisprudence we are annually accreting becomes more and more apparent.").

⁴⁷⁸ See *Walton*, 497 U.S. at 671 (Scalia, J., concurring).

⁴⁷⁹ See *Johnson*, 509 U.S. at 374 (1993) (Thomas, J., concurring) (arguing that *Penry v. Lynaugh*, 492 U.S. 302 (1989), requiring mitigating factors to be considered, was wrongly decided); *Graham*, 506 U.S. at 493-500 (Thomas, J., concurring).

⁴⁸⁰ 506 U.S. 461 (1993).

⁴⁸¹ See *id.* at 480-85 (Thomas, J., concurring). One commentator has criticized this argument:

Justice Thomas is self-deluded to believe that mandatory death sentences would reduce racial discrimination in capital sentencing. The formalistic view of the criminal justice process evident in Justice Scalia's and Justice Thomas's arguments about discretion blind these justices to the cumulative impact of discretion and other factors on capital punishment decisions.

Christopher E. Smith, *The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 *DRAKE L. REV.* 593, 613 (1995).

⁴⁸² See *Graham*, 506 U.S. at 498-99 (Thomas, J., concurring).

body.”⁴⁸³ Because the Fifth Amendment specifically refers to capital crimes, the Eighth Amendment cannot prohibit capital punishment.⁴⁸⁴ Justice Scalia therefore reasons that the Constitution must permit the death penalty and the only solution is to eliminate arbitrariness by abandoning the requirement of individualized sentencing.

As a practical matter, however, even if mitigating circumstances were to be eliminated, the Court has failed to develop a jurisprudence around aggravating circumstances that sufficiently eliminates arbitrariness.⁴⁸⁵ Thus, Justice Scalia’s position regarding arbitrariness is inconsistent. While criticizing arbitrariness in decisions not to impose the death penalty, Justice Scalia has embraced arbitrariness in decisions to impose the death penalty. In *Walton*, he announced that mitigating factors are not constitutionally necessary and that he would no longer follow *Lockett* because of the arbitrariness resulting from the use of unlimited mitigating factors.⁴⁸⁶ Since *Walton*, however, Justice Scalia has voted to uphold some of the arbitrary factors discussed in this Article. Specifically, he voted to uphold the use of victim impact statements in *Payne*.⁴⁸⁷ Indeed, in *Payne*, Justice Scalia noted that he would vote to allow consideration of victim impact evidence even if *Lockett* were overruled.⁴⁸⁸ As one commentator has noted, Scalia’s vote in *Payne* to permit victim impact statements “reveal Scalia’s implicit rejection of the premises of *Furman* and *Gregg* and his insensitivity to the problem of arbitrariness that motivated the plurality opinions in those cases.”⁴⁸⁹

⁴⁸³ Smith, *supra* note 481, at 611.

⁴⁸⁴ See *Callins v. Collins*, 114 S. Ct. 1127, 1127 (1994) (Scalia, J., concurring in the denial of the petition for writ of certiorari).

⁴⁸⁵ One commentator agrees:

First, even if the Court were to overrule the *Woodson-Lockett* line of cases, states could still *allow* complete discretion to dispense mercy (although they could no longer be *forced* to do so). . . . Second, the remaining doctrine, guided discretion, also fails to advance consistency in sentencing, at least as long as merely narrowing the class of death-eligible offenders satisfies the guided discretion requirement. . . . For example, under the guided discretion law upheld in *Gregg v. Georgia*, once the sentencer establishes one aggravating factor as a threshold requirement, it can consider fully any aggravating evidence in determining whether to impose a sentence of death. But allowing the sentencer to base its decision on any aggravating factors whatsoever produces the same dilemma as permitting it to rely on any mitigating evidence: There is then no consistent explanation why some defendants receive the death sentence and others do not.

Srikanth Srinivasan, Note, *Capital Sentencing Doctrine and the Weighing-Nonweighing Distinction*, 47 STAN. L. REV. 1347, 1356 (1995) (footnotes omitted).

⁴⁸⁶ See *Walton*, 497 U.S. at 673 (Scalia, J., concurring).

⁴⁸⁷ See *Payne v. Tennessee*, 501 U.S. 808, 833 (1991) (Scalia, J., concurring).

⁴⁸⁸ See *id.*

⁴⁸⁹ Steven G. Gey, *Justice Scalia’s Death Penalty*, 20 FLA. ST. U. L. REV. 67, 96 (1992). Justice Scalia’s inconsistency regarding arbitrariness is somewhat explained by

Perhaps, then, the solution is to have a true mandatory system. Over the last twenty years, however, the Supreme Court consistently has held that mandatory death penalty schemes violate the Eighth Amendment.⁴⁹⁰ Justice Scalia's position would require a reversal of all of those decisions. As the plurality noted in *Woodson*,⁴⁹¹ "evolving standards of decency," show that mandatory death sentences are not consistent with the Eighth Amendment because they treat offenders "as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."⁴⁹² As early as *McGautha*, in which the Court upheld total discretion, the Court has recognized the undue harshness of a mandatory death penalty scheme. History has illustrated the problems with mandatory death sentences, including the resulting use of jury nullification. "The consistent course charted by the state legislatures and by Congress since the middle of the past century demonstrates that the aversion of jurors to mandatory death penalty statutes is shared by society at large."⁴⁹³

Despite Justice Scalia's compelling arguments regarding the problems with the present system, he has little support for a return to a mandatory

Professor Gey's discussion of Justice Scalia's philosophy regarding the death penalty:

In Scalia's universe, the trial serves only incidentally to mete out individual justice to a deserving defendant; its primary aim is to express society's sense of moral outrage and reaffirm collective values about justice. The defendant's punishment is a means to satisfy a social end, rather than an end in itself. If the unanticipated harm caused by a defendant is egregious enough, and that harm outrages society to a sufficient degree, the social outrage itself will justify a death sentence even though the defendant is no more morally guilty than other murderers who do not receive death sentences. This explains Scalia's willingness to abandon requirements that a judge or jury be required to consider any evidence the defendant wishes to introduce during the penalty phase to mitigate the defendant's moral culpability for a capital crime. In Scalia's universe, the sentencer may consider the defendant's moral guilt irrelevant.

Id. at 124 (footnotes omitted).

⁴⁹⁰ Indeed, even prior to *Woodson* and *Lockett*, the Court noted society's aversion to mandatory death sentences: "This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions" *Williams v. New York*, 337 U.S. 241, 247 (1949); *see also* *Winston v. United States*, 172 U.S. 303 (1899) (construing the Act of January 15, 1897, which permitted a jury to qualify a murder conviction by returning a guilty verdict "without capital punishment," as extending to every case in which death would not be just, regardless of the presence or absence of mitigating circumstances).

⁴⁹¹ *See Woodson v. North Carolina*, 428 U.S. 280, 293 (1976).

⁴⁹² *Id.* at 304.

⁴⁹³ *Id.* at 295. In *Walton*, Justice Stevens noted that "this Nation's long experience with mandatory death sentences—a history recounted at length in our opinion in *Woodson* and entirely ignored by Justice Scalia today—has led us to reject such rules." *Walton v. Arizona*, 497 U.S. 639, 719 (1990) (Stevens, J., dissenting) (footnote omitted).

scheme.⁴⁹⁴ A mandatory scheme would eliminate most of the arbitrariness of the present system. The only question remaining is whether, contrary to history, the Constitution and society would embrace such a harsh solution.

E. The View That the Death Penalty Is Unconstitutional Because It Cannot Be Administered Fairly

In 1993, Justice Blackmun, who was one of the original Justices to vote to uphold the death penalty in *Gregg* and *Furman*, came to the conclusion, as had Justices Scalia and Thomas, that the principles of individualized sentencing and eliminating arbitrariness are incompatible.⁴⁹⁵ Justice Blackmun, in contrast to Justice Scalia, believed that both principles are constitutionally required.⁴⁹⁶ Thus, in *Callins v. Collins*,⁴⁹⁷ dissenting from the denial of a petition for writ of certiorari, Justice Blackmun concluded that because the Court's effort to balance those two constitutional requirements is a "futile effort,"⁴⁹⁸ the death penalty violates the Constitution.⁴⁹⁹

In examining the Court's capital punishment cases, Justice Blackmun noted that the Court "is retreating not only from the *Furman* promise of

⁴⁹⁴ As noted above, Justice Thomas has argued for a system that is less discretionary than the present scheme, but it is unclear whether he would embrace a completely mandatory system. See *Graham v. Collins*, 506 U.S. 350, 498-99 (Thomas, J., concurring). Chief Justice Rehnquist also has embraced some aspects of a mandatory scheme. See *Sumner v. Shuman*, 483 U.S. 66, 86 (1987) (White, J., dissenting). Chief Justice Rehnquist joined Justice White's dissenting opinion in *Sumner* that argued that it is constitutional to have a mandatory death sentence for a prisoner who commits murder while serving a life sentence. See *id.* Justice Scalia, however, is the only Justice taking an extreme position on this issue.

⁴⁹⁵ See *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from the denial of the petition for writ of certiorari).

⁴⁹⁶ Justice Blackmun stated that a capital sentencing scheme must:

afford[] the sentencer the power and discretion to grant mercy in a particular case, and provid[e] avenues for the consideration of any and all relevant mitigating evidence that would justify a sentence less than death. Reasonable consistency, on the other hand, requires that the death penalty be inflicted evenhandedly, in accordance with reason and objective standards, rather than by whim, caprice, or prejudice.

Id. (Blackmun, J., dissenting).

⁴⁹⁷ 510 U.S. 1141 (1994).

⁴⁹⁸ *Id.* at 1145 (Blackmun, J., dissenting).

[O]ver the past two decades, efforts to balance these competing constitutional commands have been to no avail. Experience has shown that the consistency and rationality promised in *Furman* are inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness.

Id. at 1132 (Blackmun, J., dissenting).

⁴⁹⁹ See *id.* at 1159 (Blackmun, J., dissenting).

consistency and rationality, but from the requirement of individualized sentencing as well."⁵⁰⁰ He noted that in addition to abandoning various sentencing safeguards, such as by allowing the jury to consider vague aggravating circumstances and by allowing courts to limit the consideration of relevant mitigating evidence, the Court has limited the role of the federal courts in reviewing capital cases.⁵⁰¹ Not only is the system morally and constitutionally unfair, Justice Blackmun reasoned, but it also increases the likelihood that innocent defendants will be executed.⁵⁰²

Justice Blackmun criticized the Court for effectively conceding that fairness and rationality cannot be achieved and for choosing "to deregulate the entire enterprise, replacing, it would seem, substantive constitutional requirements with mere aesthetics, and abdicating its statutorily and constitutionally imposed duty to provide meaningful judicial oversight to the administration of death by the States."⁵⁰³ Proclaiming, "I no longer shall tinker with the machinery of death,"⁵⁰⁴ Justice Blackmun stated that he would no longer vote to uphold death sentences because the death penalty violates the Constitution.⁵⁰⁵ After Justice Powell retired from the bench, he came to

⁵⁰⁰ *Id.* at 1129 (Blackmun, J., dissenting).

⁵⁰¹ *See id.* at 1138 (Blackmun, J., dissenting); *see also* SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, AMERICAN BAR ASS'N, *supra* note 300 (calling on jurisdictions to put a moratorium on executions until, inter alia, courts are able to properly review constitutional claims in state post-conviction and federal habeas corpus proceedings).

⁵⁰² *See Callins*, 114 S. Ct. at 1138 (Blackmun, J., dissenting). "The Court is unmoved by this dilemma, however; it prefers 'finality' in death sentences to reliable determinations of a capital defendant's guilt." *Id.* (Blackmun, J., dissenting).

⁵⁰³ *Id.* at 1129 (Blackmun, J., dissenting).

⁵⁰⁴ *Id.* at 1130 (Blackmun, J., dissenting).

⁵⁰⁵ *See id.* at 1138 (Blackmun, J., dissenting). Justice Blackmun explained that the present system of guided discretion is doomed to failure.

Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer's discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense. By the same token, any statute or procedure that would provide the sentencer with sufficient discretion to consider fully and act upon the unique circumstances of each defendant would "thro[w] open the back door to arbitrary and irrational sentencing."

Id. at 1136 (Blackmun, J., dissenting) (quoting *Graham v. Collins*, 506 U.S. 461, 494 (1993) (Thomas, J., concurring)).

All efforts to strike an appropriate balance between these conflicting constitutional commands are futile because there is a heightened need for both in the administration of death.

But even if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet the challenge.

a similar conclusion.⁵⁰⁶

Like Justice Scalia's proposal, Justice Blackmun's proposal simply to abandon the death penalty is logical. If the two principles are incompatible and the two principles are constitutionally required, the death penalty is unconstitutional.

Because the present system of aggravating and mitigating factors has resulted in a system with the problems of both mandatory and arbitrary death penalty schemes, Justice Blackmun's arguments, like Justice Scalia's, are compelling. Justice Blackmun's solution, like Justice Scalia's, is extreme because it requires that the Court abandon established constitutional doctrines. Perhaps, however, it is the only option if the death penalty cannot be implemented with the fairness that the Eighth and Fourteenth Amendments command.

V. RESOLVING THE PARADOX

There is no perfect procedure for deciding in which cases governmental authority should be used to impose death.⁵⁰⁷

After rejecting capital sentencing statutes that gave sentencers complete discretion and after rejecting mandatory capital sentencing statutes, the Court has developed an Eighth Amendment jurisprudence that has embraced the evils of both of those systems. Over twenty years after *Furman*,⁵⁰⁸ death penalty statutes continue to be broadened to increase the likelihood that defendants will be sentenced to death, resulting in a death penalty that contains many similarities to harsh mandatory death penalty schemes.⁵⁰⁹ At the same time, the Court has permitted a system of sentencing factors that tolerates a substantial amount of arbitrary discretion, including the systemic factors discussed above,⁵¹⁰ as well as prosecutorial discretion and racial bias.

Although it may seem paradoxical to claim that a system is both mandatory and arbitrary, that is the system we currently have. While obviously it

Id. (Blackmun, J., dissenting).

⁵⁰⁶ See JEFFRIES, *supra* note 10, at 451.

In truth, it was not a change of heart, but a change of mind—not an emotional conversion to the view that execution is never justified, but a reasoned interpretation of experience. Justice Powell's experience taught him that the death penalty cannot be decently administered. As actually enforced, capital punishment brings the law itself into disrepute.

Jeffries, *supra* note 10, at A23.

⁵⁰⁷ *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (Burger, C.J., plurality opinion).

⁵⁰⁸ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁵⁰⁹ See discussion *supra* Part III.

⁵¹⁰ See discussion *supra* Part II.

is not completely one or the other, the system has the constitutional faults of both. We are left to wonder whether we would have only half of the constitutional problems we now face if the Court were to embrace one or the other completely.

None of the Justices or commentators suggest a return to the *McGautha* days when juries had almost complete and unfettered discretion in determining who received a death sentence. As Professor McCord suggested, attorneys probably do not want to return to such a system either.⁵¹¹ In many ways, however, we now have that system. Perhaps the present system is worse than the old system in the sense that the present system has the false appearance of being a fair and nonarbitrary system. Although Professor McCord argued that the present system works, Professors Steiker and Steiker have argued that "the Supreme Court's detailed attention to death penalty law has generated negligible improvements over the pre-*Furman* era, but has helped people to accept without second thoughts—much less 'sober' ones—our profoundly failed system of capital punishment."⁵¹² One may ask who is correct. Do we have a better system or only a system that allows the public to pretend that the system works?

The paradox is that McCord and the Steikers each are correct. Some narrowing has occurred, but it has not occurred in a significant or rational way. The system is better than the *McGautha* era because the present capital sentencing statutes eliminate some first-degree murders from the capital sentencing pool. The system is not better than the *McGautha* era because it is arbitrary in selecting who is eliminated from the pool and because it eliminates only a few defendants before reopening the system to unlimited arbitrariness.

The two best alternatives to the constitutional paradox of today's arbitrary mandatory death sentencing scheme are the solutions that individual Supreme Court Justices have suggested. In short, "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all."⁵¹³ One option is to impose it "fairly" by following the suggestion of Justices Scalia and Thomas by completely embracing a mandatory death penalty.

⁵¹¹ See McCord, *supra* note 295, at 593.

So, while death penalty opponents rue the Court's failure to regulate death more severely, I doubt that there is one experienced capital defense lawyer in this country who would rather return to the pre-*Furman* era. Perhaps not even many *prosecutors* would want to return to the days before *Furman*, when such an unguided power of life and death rested in their hands.

Id.

⁵¹² Steiker & Steiker, *supra* note 98, at 438; see also *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting) ("I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor.").

⁵¹³ *Edwards v. Oklahoma*, 455 U.S. 104, 112 (1982).

Such a system would need to go beyond Justice Scalia's upholding of arbitrary factors, like victim impact evidence, by requiring a mandatory death sentence for all first-degree murderers. To permit the consideration of vague aggravating factors would open the door to the arbitrariness discussed in this Article, so under the proposed system every first-degree murderer or a clearly defined group would need to receive a death sentence. Although such a system would increase the harshness of today's death penalty, its arbitrariness would be eliminated.

The other option is to follow Justices Blackmun and Powell, who both originally voted to uphold today's death penalty scheme, and subsequently concluded that the death penalty should be imposed "not at all."⁵¹⁴ Holding the death penalty unconstitutional would acknowledge that all attempts to impose the ultimate punishment in a fair manner have failed and that the only constitutional alternative is to abandon the punishment altogether.

Instead of embracing one of these two options, the Court has left us with a compromise and only the appearance of a fair process. In short, the Court's constitutional interpretation is one that has neither the stomach for the harshness of a mandatory death penalty nor the willingness to counter public opinion.

The question is which of the two choices is the better option—a mandatory death penalty or no death penalty. Perhaps part of the answer lies in examining the underlying reasoning for the positions taken by Justices Scalia and Blackmun, who both recognize the same problems but come to radically different conclusions.

Justice Scalia believes in the moral philosophies supporting capital punishment. For example, in one dissent Scalia argued that potential jurors who state during voir dire that they always will vote for the death penalty should be permitted to sit as jurors, while jurors who always will vote against the death penalty should be struck for cause.⁵¹⁵ In that opinion, Justice Scalia quoted Immanuel Kant in what may be his own view regarding retribution and the death penalty:

Even if a Civil Society resolved to dissolve itself with the consent of all its members . . . the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds⁵¹⁶

⁵¹⁴ See *supra* notes 9-10 and accompanying text.

⁵¹⁵ See *Morgan v. Illinois*, 504 U.S. 719, 739 (1992) (Scalia, J., dissenting).

⁵¹⁶ *Id.* at 752 n.6 (quoting IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 198 (W. Hastie trans., Augustus M. Kelley Publishers 1974) (1887)); see also Gey, *supra* note 489, at 120-32 (discussing Justice Scalia's philosophies about the death penalty). "In Scalia's universe, the trial serves only incidentally to mete out individual justice to a

In contrast, before Justice Blackmun came to the conclusion that the death penalty is unconstitutional, he noted his moral distaste for capital punishment. Indeed, in his *Furman* dissent, even though he voted to uphold the death penalty, he stated: "I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds."⁵¹⁷ He added that for him, "it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop."⁵¹⁸

Perhaps the decision of whether to eliminate today's death penalty scheme altogether or to replace it with a mandatory death penalty scheme depends upon the principles and philosophies underlying the constitutionality of the death penalty per se and whether such principles justify the harshness of mandatory death sentences. In other words, if the death penalty is absolutely necessary to American society, we must accept a mandatory death penalty. If, however, it is not so necessary that it justifies such harshness, it must be abandoned. Other factors that must be evaluated include aspects that undermine the constitutionality of the Court's capital punishment system. Such factors include claims of racial bias, lack of federal review, no constitutional right to state post-conviction review, inadequate funding for capital defense, and poor representation by capital defense counsel.⁵¹⁹

However, even without considering other factors affecting the constitutionality of the death penalty per se, the logical correct path is evident merely from the evolution of the present system. This view is illustrated by the conversion of Justice Powell, who wrote several opinions upholding the death penalty, including the Court's opinion in *McCleskey v. Kemp*.⁵²⁰ Justice Powell did not believe that executions are never justified; however, his experience on the Court in attempting to regulate the punishment "taught him that the death penalty cannot be decently administered."⁵²¹

deserving defendant; its primary aim is to express society's sense of moral outrage and reaffirm collective values about justice." *Id.* at 124.

⁵¹⁷ *Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting).

⁵¹⁸ *Id.* at 405-06 (Blackmun, J., dissenting).

⁵¹⁹ See *supra* note 300 (briefly discussing these considerations); see also *Coleman v. Thompson*, 501 U.S. 722 (1991) (implying there is no constitutional right to state post-conviction proceedings or to effective assistance of counsel at that stage); *Murray v. Giarratano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring).

⁵²⁰ In *McCleskey*, the Court upheld the constitutionality of the death penalty despite the defendant's statistics indicating a general racial bias in the use of the punishment. See *McCleskey v. Kemp*, 481 U.S. 279, 308 (1987). After retiring, Justice Powell stated that he regretted his vote in *McCleskey*. See JEFFRIES, *supra* note 10, at 451.

⁵²¹ JEFFRIES, *supra* note 10, at 451.

Similarly, other judges have also concluded that the death penalty system does not work in practice and should be abolished. In a recent opinion, Judge Heaney of the United States Court of Appeals for the Eighth Circuit announced in his "view that this nation's administration of capital punishment is simply irrational, arbitrary, and unfair."⁵²² Chief Justice Gerald Kogan of the Florida Supreme Court, who is not morally opposed to the death penalty, recently began speaking out against capital punishment because the cumbersome system does not work.⁵²³ Although Thomas Zlaket, the Chief Justice of the Arizona Supreme Court, has stated that he will apply the death penalty as required, he has concluded that the system has failed.⁵²⁴ In 1995, Justice Robert Utter resigned from the Washington Supreme Court because of his opposition to capital punishment and because he could not be part of a death penalty system that "is fatally flawed."⁵²⁵

Examining only the process used in implementing the death penalty, one notes that the United States has tried mandatory sentencing, unguided sentencing discretion, and guided sentencing discretion. The last two approaches clearly have been failures. Furthermore, mandatory death sentences have not worked historically.⁵²⁶ Additionally, as discussed above, scholars have failed to create a workable alternative to the present system, which is both mandatory and arbitrary in nature.

Because all attempts to impose the death penalty with a fair consistency have failed, the only alternative, as the Court has stated, is to apply it "not at all."⁵²⁷ The Court has never tried true abolition of the death penalty. After twenty years, it is time to take a new direction away from the failed experiment. Perhaps Justice Powell recognized the final paradox of today's death penalty: By attempting to save the constitutionality of the death penalty by imposing guidelines and permitting discretion at the same time, the

⁵²² Singleton v. Norris, 108 F.3d 872, 876 (8th Cir. 1997) (Heaney, J., concurring). Judge Heaney noted, "I am confident that no death penalty system can ever be administered in a rational and consistent manner." *Id.* at 876.

⁵²³ See Peter Wallsten, *Florida's Chief Justice Questions Death Penalty*, PRESS J. (Vero Beach, Fla.), Jan. 2, 1998, at A1.

⁵²⁴ See Jenny Staletoovich, *Justice Raising Voice to Bury Death Penalty*, PALM BEACH POST, Jan. 19, 1998, at 1A. Chief Justice Zlaket has noted, "Most people don't have the slightest clue how difficult it is to administer the death penalty in a consistent fashion . . ." Editorial, *Another Execution; This Shouldn't Be Easy*, ARIZ. REPUBLIC, Jan. 24, 1997, at B6.

⁵²⁵ Patti Epler, *Revolt from the Bench; Utter Leaves Court Monday in Protest of Death Penalty*, NEWS TRIB., April 23, 1995, at B1.

⁵²⁶ "[T]he 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process. . . . This change in sentencing practice was greeted by the Court as a humanizing development." Furman v. Georgia, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting).

⁵²⁷ Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

Court has doomed the process and the punishment to being the ultimate failure in the United States criminal justice system.

VI. CONCLUSION

The modern era of the Court's evaluation of the constitutionality of the death penalty began with a simple principle: While treating all defendants equally, sentencers should fully and fairly consider each defendant and the crime committed before deciding whether to execute or to imprison. The Court's twenty-year struggle to attain this goal through regulating sentencing criteria has taught us that the goal is impossible to attain and has left us with an arbitrary mandatory death penalty system. As human beings, defendants are too complex for legislatures to design clear and specific guidelines for determining whether the accused should be destroyed. Thus, we are left only with the choice of executing all first-degree murderers or executing none.

The capital punishment system used in the United States consumes a large amount of resources⁵²⁸ for little progress in trying to achieve a fair use of the ultimate punishment. Presently, there are well over 3,000 people on death rows around the country and, although the number of executions is increasing, the number of those living on death row continues to climb.⁵²⁹ The numbers are disturbing, but so is the process by which we have selected these individuals among thousands of others convicted of murder. The factors distinguishing those sentenced to death from those not sentenced to death are not well defined, resulting in a situation where among a large group of convicted first-degree murderers it is impossible to distinguish between those with life sentences and those with death sentences.⁵³⁰ "[T]he inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution."⁵³¹

The science of determining who should be executed is inexact. Maybe the present arbitrary mandatory process by which defendants are selected for the death penalty is the best compromise the Court can reach, and perhaps it

⁵²⁸ See, e.g., Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 135-36 (1989) (citing several studies that found that it is more expensive for states to use the death penalty instead of life imprisonment).

⁵²⁹ See generally Snell, *supra* note 337 (documenting the status of the death penalty in the United States in 1996).

⁵³⁰ See *supra* notes 446-50 and accompanying text (briefly discussing the use of the death penalty in the United States at the time of Timothy McVeigh's sentencing).

⁵³¹ *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from the denial of the petition for writ of certiorari).

is the only way to walk the line between a harsh mandatory system and an arbitrary unguided discretion system. "Such, it will be said, is human justice But that sad evaluation is bearable only in connection with ordinary penalties. It is scandalous in the face of verdicts of death."⁵³²

After a failed twenty-year experiment, the Court should reexamine the constitutionality of the death penalty and the overall process by which defendants are selected for the gas chamber, electric chair, rope, firing squad, or gurney. If the Court were to reexamine the system, its only logical conclusion would be that the paradox of the arbitrary mandatory death penalty system can be eliminated only by eliminating the death penalty.

⁵³² ALBERT CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION AND DEATH 131, 165 (Justin O'Brien trans., 1960).